CASE LAW UPDATE

HONORABLE STEVEN RHODES VETERANS DAY CONFERENCE

NOVEMBER 10, 2023

Honorable James Boyd
United States Bankruptcy Judge
Western District of Michigan

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II. Sovereign Immunity

Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 599 US ___., 2023 WL 4002952 (2023) – Congress may abrogate tribal sovereign immunity if it unequivocally expresses purpose. Courts will not lightly assume Congress intended to undermine Indian self-government. Congress need not state its intent in any particular way and Congress is not required to use "magic words" to make intent to abrogate clear. Section 106, adopted in response to two Supreme Court cases that held that prior section was insufficiently clear to abrogate state and federal sovereign immunity, unequivocally abrogates immunity as to any "governmental unit" to extent set forth. "Governmental unit" defined as United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of United States, a State, a Commonwealth, a District, a Territory, a municipality, or foreign state; or other foreign or domestic government, covers essentially all forms of government and is not limited to units that trace origins to Constitutional system of government. Native American Tribe is "government" because it acts as governing authority of members and territories. Tribe is domestic, not foreign, as Tribe belongs or exists within boundaries of United States.

Financial Oversight and Management Board for Puerto Rico v. Centro de Periodisimo Investgativo, Inc., 598 US ____ (2023) – Court uses stringent test for determining congressional intent to abrogate sovereign immunity. Congressional intent to abrogate sovereign immunity must be unmistakably clear in language of statute. Where statute is susceptible of multiple plausible interpretations, Court will not read it to strip immunity. If defendant enjoys sovereign immunity abrogation requires unequivocal declaration. Standard met in only two situations: When statute says in so many words; or statute creates cause of action and authorizes suit against government on that claim. PROMESA does not expressly authorize claims against the Board and judicial review provisions and liability protections are compatible with Board general retention of sovereign immunity.

III. Jurisdiction

MOAC Mall Holdings, LLC v. Transform Holdco, LLC, 143 S.Ct. 927 (2023) – Inclusion by Congress of limitations on Court's ability to orders is not necessarily insurmountable jurisdictional bar. Interpretation of limitation as non-waivable jurisdictional bar requires clear statement that Congress intended to limit Court's power. While no "magic words" need to be included, Congress'

intent must be clear, not merely that jurisdiction reading is plausible or "better. Section 363(m) provision that reversal of Order allowing sale or assignment under Section 363 does not affect validity of underlying transaction is not jurisdictional but is, at best, limitation on remedy. Transferor proposed to assume and assign lease. Landlord objected arguing that proposed Assignee did not provide adequate assurance of future performance. Bankruptcy Court approved the transfer. Landlord appealed and sought stay under Section 363(m). Assignee opposed stay, arguing that it had no intention of asserting Section 363(m) as bar to appeal. Court denied stay and matter proceeded to District Court which entered opinion reversing and remanding. Assignee filed Motion for Rehearing contending that District Court lacked jurisdiction under Section 363(m). Landlord argued that Assignee affirmative represented to both Bankruptcy Court and District Court that it would not rely on Section 363(m). While District Court was "appalled" by Assignee's tactics, the Court found (under binding Second Circuit authority) that Section 363(m) operated as jurisdictional bar that was not subject to waiver or judicial estoppel, and dismissed appeal. Supreme Court concluded that Section 363(m) did not contain any indication that Congress intended a jurisdictional limitation, but instead a limitation on remedy. Section 363(m) itself contains provisions for Court to reverse where the parties acted in bad faith, where the order was stayed pending appeal, or where Court Appellate court did something other than reverse or modify the Lower Court's Order. While Section 363(m) "cloaks" good-faith participants against later modification, that did not amount to jurisdictional issue. Because Section 363(m) was not jurisdictional, Court could conclude that Assignee's prior renouncement of reliance on Section 363(m) could be enforceable either under waiver or judicial estoppel, leaving Court will full ability to adjudicate issues on appeal.

The Court also took up, and at least implicitly limited, "equitable mootness". Assignee argued that there was no remedy even if the Appellate Court reversed the sale as there is no mechanism in the Code to "unwind" the transaction. The Court held that the matter was not equitably moot because it was not clear either that (a) the Court could not unwind the transaction or (b) that some other form of relief could be available.

IV. Equitable Mootness

Taleb v. Gold, 2023 WL 4044112(6th Cir. 2023) –Court has Constitutional duty to exercise jurisdiction conferred on it. Court may not apply independent policy judgments to recognize cause of action that has been denied by Congress or to limit cause of action that Congress created merely because prudence dictates. Presumptive position is Federal Courts should hear and decide on merits cases properly before them. Equitable mootness does not follow from Article III and is not "mootness" but is instead prudential doctrine that permits Court to decline to rule on merits of Bankruptcy appeals even though Court plainly has appellate jurisdiction and ability to provide relief and amounts to unwillingness, not inability, to decide appeal. Equitable mootness may bar bankruptcy appeal when necessary to protect parties who rely on successful confirmation of plan from drastic changes after appeal., taking into account (1) where stay was obtained; (2) whether plan is substantially consummated; and (3) whether relief requested would affect rights of parties not before court or success of plan. Equitable mootness can apply in Chapter 9 and Chapter 11. Policies do not allow application in Chapter 7 involving liquidation of assets and distribution to creditors. Liquidation does not involve third party releases or need for

finality or create expectations that necessarily arise from confirmed Plan. Court would not expand "already questionable doctrine" to Chapter 7 liquidations.

MOAC Mall Holdings, LLC v. Transform Holdco, LLC, 143 S.Ct. 927 (2023) – Court at least implicitly limited "equitable mootness". Assignee argued that there was no remedy even if the Appellate Court reversed the sale as there is no mechanism in the Code to "unwind" the transaction. The Court held that the matter was not equitably moot because it was not clear either that (a) the Court could not unwind the transaction or (b) that some other form of relief could be available.

V. Garnishment and Execution

Capitol Indemnity Corporation v. Sparks, 2023 WL 4571954 (Bankr. W.D. Mi. 2023) – Federal Rule of Civil Procedure 69 allows enforcement of money judgment by execution unless court directs otherwise. Procedure for execution governed by laws of state where court is located subject to applicable federal statutes. Final Judgment that declared debt non-dischargeable but did not incorporate award of money damages was not money judgment subject to execution. While State Court Judgment that awarded damages was "money judgment", Court Order determining non-dischargeability itself did not award damages. Further, MCL 600.2801 governing execution requires Clerk of Court to certify current balance due under judgment. Order excepting debt from discharge did not provide "balance due" leaving Clerk unable to make statutory certification. Judgment liens based on Order determining non-dischargeable invalid. Creditor with prepetition judgment who seeks to except debt from discharge should not seek additional money judgment from bankruptcy court. Creditor should seek declaration that debt will survive discharge and to then enforce original money judgment in rendering court or domesticate any out-of-state or federal judgments if necessary under local law.

VI. Arbitration

Coinbase, Inc. v. Bielski, 599 US ____, 2023 WL 4138983 (2023) – Federal Arbitration Act, 9 USC Section 16(a) allows party to take interlocutory appeal when trial court denies motion to compel arbitration. Immediate appeal of order denying arbitration is exception to general rule that interlocutory orders are not appealable and exception does not apply to orders granting motions to compel arbitration. Notice of Appeal divests lower court of jurisdiction over any aspect of case involved in appeal. Appeal of Order Denying Motion to Compel essentially involves entire case as issue is whether case can go forward in District Court. Filing of Notice of Appeal of Order Denying Motion to Compel requires immediate stay of all proceedings while appeal is resolved. Decision departs from general rule that interlocutory appeal does not prevent Trial court from determining which parts of case should continue unabated.

Pillsbury Winthrop Shaw Pittman, LLP v. Cuker Interactive, LLC, 2021 WL 196468 (S.D. Ca. 2021) – Dispute regarding secured versus unsecured nature of debt is not subject to mandatory arbitration provision of contract. Bankruptcy Court has discretion to decline to enforce an otherwise applicable arbitration provision if arbitration would conflict with the underlying purposes of the Bankruptcy Code. Status of claim as secured versus unsecured is part of claims resolution process which is part of core bankruptcy jurisdiction. Bankruptcy Court did not abuse discretion in determining that central policies of bankruptcy that (1) having bankruptcy law issues

decided by bankruptcy courts; (2) centralizing resolution of bankruptcy disputes; and (3) avoiding piecemeal litigation were furthered by denying Motion to Compel Arbitration.

Allied Title Lending, LLC v. Taylor, 2019 WL 5406039 (E.D. Va. 2019) – Although Federal Arbitration Act establishes liberal policy favoring arbitration, Congress intended to grant comprehensive jurisdiction to bankruptcy courts to deal efficiently and expeditiously with all matters connected with bankruptcy estate. Arbitration of constitutionally core claims inherently conflict with purposes of Bankruptcy Code. Bankruptcy court is generally well within discretion to refuse arbitration of constitutionally core claims. Even where issues are constitutionally non-core, compelling arbitration would inherently undermine Code's purpose of facilitating efficient reorganization through centralization of dispute resolution procedures. Claim objection asking that claim be disallowed as allegedly in violation of statue usury laws thereby precluding creditor from collecting at all is constitutionally core claim as objection is direct challenge to claim and contends that claim should be disallowed in full. Bankruptcy Court did not abuse discretion in holding that arbitration would inherently conflict with purposes of Bankruptcy Code thereby creating conflict between arbitration and Congressional intent for Bankruptcy Courts to manage claims process.

VII. Sub V Eligibility

In re Dobson, 2023 WL 3520546 (Bankr. W.D. Va. 2023) - Eligibility for Subchapter V determined by facts in existence at filing and is not affected by post-petition events. On petition date, Debtors were engaged in business through debtor-husband's wholly-owned corporation. One day after filing, husband's company filed Chapter 7. UST contended that debts of affiliate must be included in total debt which puts Debtors over debt limit. Section 1182 does not require Court to consider post-petition events in determining eligibility. Statute provides basic eligibility formula: person must be engaged in commercial or business activities; person must have debts as of petition date under statutory cap; person must show that not less than 50 percent of debts arose from commercial or business activities; and must not fall within exceptions. Person either meets all these conditions and is eligible or does not. Section 1182 does not include postpetition events or persist throughout case or contain any other language that debtor's eligibility is not determined as of initiation of case. At date of petition, Debtor-husband was sole owner of related company but company was not in bankruptcy and so was not an "affiliated debtor" in bankruptcy.

VIII. Chapter 11 and Sub. V

BenShot, LLC v. 2 Monkey Trading, LLC, 650 BR 521 (Bankr. M.D. Fl.), *certification for direct appeal granted,* 2023 WL 3947494 (Bankr. M.D. Fl. 2023) – Discharge exceptions in Section 523 do not apply to corporate debtor in Subchapter V. Plain language of Section 523 makes exceptions applicable only to individual debtors. Had Congress intended to include corporations, it could have done so. Court granted motion for certification for direct appeal as issue presented had not been ruled on by Eleventh circuit and split of authority based on Fourth Circuit holding in *Cantwell-Cleary*.

Nutiren Ag Solutions, Inc. v. Hall, 2023 WL 2927164 (Bankr. M.D. Fl. 2023) – Corporate Debtor is not subject to non-dischargeability action under Section 523. Section 523 allows Court to deny

discharge to an "individual" which does not include corporate entities. Court rejected *Cantwell-Cleary Co. v. Cleary Packaging, LLC,* 36 F.4th 509 (4th Cir. 2022) and aligned itself with Bankruptcy Courts from Michigan, Idaho, Maryland and Texas. Subchapter V Debtors receive discharge under Section 1192 that are is subject to Section 523.

In re LATAM Airlines Group, S.A., 55 F.4th 377 (2nd Cir. 2022) (joining with sister circuits, claim is "impaired" only when bankruptcy plan, not Bankruptcy Code, alters creditor's rights).

Cantwell-Cleary Co. v. Cleary Packaging, LLC, 2022 WL 2032296 (4th Cir. 2022) – Reference in Section 523 to exception from discharge of "an individual debtor" does not limit scope pf non-dischargeability solely to individuals. Section 1192(2) provides that discharge includes all debts except any debt of the kind specified in Section 523(a). Subchapter V defines "debtor" as "person engaged in commercial or business activity that has not more than $7.5 million in debt. "Person" is defined in Section 101(9) to include individuals and corporations. Section 1192 provides for discharge of debts of both corporate and individual debtors and all debtors individual or corporate are subject to exceptions to discharge under Section 523.

IX. Chapter 13 – Vesting

In re McLain, 2019 WL 2323776 (Bankr. W.D. Mi. 2019) - "Vesting" of property as part of confirmation of Chapter 13 Plan removes property from estate and returns property to Debtor. Section 362(a) prohibits commencement or continuation of action or proceeding against Debtor that was or could have been commenced before commencement of case or to recover claim against Debtor that arose before commencement of case. Claim against Debtor includes claim against property of Debtor under Section 102(2). Even though property revested in Debtor at confirmation, stay continues to protect it.

In re Steenes, 2019 WL 1198901 (7th Cir. 2019), *opinion on rehearing,* 2019 WL 6001584 (7th Cir. 2019) - Section 1327 presumptively re-vests property in Debtor on confirmation. Plan cannot vest property in estate where effect is to permit Debtor to willfully violate State law. Chicago makes car's owner rather than driver liable for speeding, running red light, and parking violations. Debtors' confirmed Plans that vested motor vehicles in estate and then accrued parking fines and tickets of $12,000. Debtors contended that Automatic Stay precluded action against property of estate precluding City from towing or "booting" cars, effectively rendering fines uncollectable. While Bankruptcy Court has discretion to hold assets in estate, exercise of discretion requires good reason. Routine retention of property in estate is abuse of discretion where effect is to create immunity from traffic laws for duration of case. Case-specific Order supported by case-specific reasons allows asset to remain vested in estate. Court ordered that estate assets be restored to Debtor's ownership which allows City to enforce post-petition traffic violations.

Trantham v. Tate, 647 B.R. 139 (W.D.N.C. 2022). Local model plan providing for vesting of estate property in Chapter 13 debtors upon entry of final decree was not contrary to the Bankruptcy Code.

X. Post-Petition Appreciation – Chapter 13

In re Elassal, 2023 WL 5537061 (Bankr. E.D. Mi. 2023) – Post-petition appreciation inures to benefit of Debtor in Chapter 13. Two years after Debtor filed for Chapter 13, Debtor sought to

sell home. Home had appreciated significantly during case producing substantial surplus that did not exist at time of confirmation of plan. Resolution requires balancing Sections 1306 which includes post-petition property in property of estate, and Section 1327 which provides the assets vest in debtor at confirmation "free and clear of any claim or interest of any creditor provided of in the plan". Court concluded that sections best reconciled using "estate replenishment" approach, which holds that at confirmation, property is removed from estate and vested in Debtor free and clear of any interest in estate. Chapter 13 estate refills with property acquired after confirmation without regard to whether property is necessary to performance under plan. Debtor's home revested in her at confirmation. Proceeds of subsequent sale are not divorced from property itself as sale proceeds are not "newly acquired" property but are proceeds of previously owned property and do not "refill" estate. Unlike conversion to chapter 7 which vests all property that remains in possession of Debtor in to the estate, nothing in chapter 13 converts property that is not property of estate into property of estate. Sale proceeds not disposable income. Appreciation of property is not income or wages that arose post-petition and asset is not "in nature of stream of payments". Sale proceeds were not anticipated at time of confirmation.

XI. Post-Petition Appreciation – Converted Cases

In re Barrera, 22 F.4th 1217 (10th Cir. 2022). Post-petition appreciation in debtors' residence during the Chapter 13 case belonged to the debtors upon sale. That result did not change because the case converted to Chapter 7 after the sale. The court specifically declined to decide who gets the increase in equity if the case had converted to Chapter 7 prior to the sale of the property.

In re Goetz, 647 BR 412 (Bankr. W.D. Mo. 2022) aff'd, 2023 WL 3749296 (8th Cir BAP 2023) – Joining "slight minority" of courts, appreciation while case pending under Chapter 13 inures to benefit of Chapter 7 Trustee on conversion.

In re Klein, 2022 WL 3902822 (Bankr D. Colo. 2022) – Appreciation in property in Chapter 13 case belongs to debtor. Debtor owned minority interest in LLC that Debtor valued at $15,000.00, which was not exempt and fully accounted for in calculating best interest of creditors and determining plan payment and dividend to unsecured creditors. After confirmation, LLC sold primary asset and distributed $75,000.00 to Debtor as his proportionate share of proceeds. Chapter 13 Trustee attempted to claim proceeds for benefit of creditors arguing that proceeds were post-petition property that belong to the estate under Section 1306. Court noted that while Section 1306 sweeps into estate any new property, Section 1327 vests in Debtor property existing at confirmation, free and clear of any claim or interest of any creditor provided for the plan. Section 1327 is more specific than Section 1306. Section 1306 protects assets acquired post-petition by imposing protection of automatic stay while Section 1327 revests property in Debtor and allows Debtor to dispose of property and retain proceeds. Proceeds of sale of asset during a Chapter 13 do not become disposable income regardless of whether property is exempt. While Debtor may voluntarily use proceeds to make payments under Chapter 13 plan; Debtor cannot be compelled to do so.

In re Castleman, 2022 WL 2392058 (W.D. Wa. 2022) – Post-petition pre-conversion equity in Chapter 13 become property of estate in Chapter 7. Section 348 unambiguously sweeps into

Chapter 7 estate any property acquired after commencement of Chapter 13 and before conversion. Section 541 sweeps in all property owned by Debtor as of commencement including proceeds, profits and rents except to extent resulting from earnings from services performed by individual debtor post-petition. Post-petition appreciation is not separate, after-acquired property interest but is part of property itself. Property becomes property of Chapter 7 estate at conversion, including appreciation in value from commencement of case. If Debtors made mortgage payments post-petition Debtor may apply for administrative claim status under Section 503(b).

In re Parker, Case No. 19-50811 (Bankr. E.D. Mi. 2022) – Post-petition equity in property becomes property of Chapter 7 Estate upon conversion. When Debtor filed case, Debtor able to exempt all of the equity in home. Debtor converted 2 years later by which point value had increased beyond amount Debtor could exempt. Post-petition appreciation is incidental to property itself. Upon conversion, property became property of Chapter 7 estate including appreciated value.

In re Adams, 641 BR 147 (Bankr. W.D. Mi. 2022) – Section 348 sweeps into Chapter 7 estate all property of estate that remained in possession of Debtor as of date of conversion. Section 541 sweeps in all legal or equitable interests as of commencement of case with intent to sweep in every piece of property to pay claims. Value is not separate asset apart from pre-petition property but is attribute or incident of property itself. As stated by Sixth circuit in *Coslow*, post-petition increase in equity becomes part of bankruptcy estate as long as equity does not result from payment for post-petition services. Valuation in Chapter 13 is not binding on Chapter 7 estate. Trustee may sell property and account to Debtor for exemption with Trustee being able to require Debtor to relinquish possession. Court could not determine whether property was of inconsequential value as parties did not present evidence of value and court inclined to wait for Trustee to receive purchase offer to set valuation. Debtors not permitted to surcharge collateral for costs incurred to protect property or to receive administrative expense as any increase in value attributable to post-petition mortgage payments did not arise from transactions with Estate and did not directly and substantially benefit Estate. Transactions were between Debtors and third parties (mortgage company and taxing authorities) and in general parties not entitled to priority claims for expenses parties would have incurred regardless of possible priority treatment as expenditures were to benefit Debtor's own interests.

In re Masingale, 644 B.R. 530 (9th Cir. BAP 2022). In case converted from Chapter 11 to Chapter 7, Debtors' claim of homestead exemption equal to "100% of FMV" included post-Petition appreciation - where there was no timely objection to the exemption in the Chapter 11 – despite "snapshot rule".

In re Snyder, 645 B.R. 595 (Bankr. N.D. Ohio 2022). Under Ohio law, each debtor's homestead was limited to the debtor's interest in the parcel of real property used as a residence by debtor. (Two co-owned parcel's of real estate with Debtors living separately.)

XII. Personal Injury Proceeds

In re Hill, 652 BR 212 (Bankr. S.D. Al. 2023) – non-exempt proceeds of post-petiotn persoan linjury aciotn are proeryt Chapter 13 Estae. Plan provided hta assets re-vest nly at dismissal or

discharge, so personal injry action remaind property oresate post-confirmation. Post-petiton proceedsa re assets, not income so proceeds are not part of "disposa ble income". Only regular income ans bustittes re codiderd dispsoalb ein co n Chatpe r13. Proceeds would not be included in liquidationa nalysis as inury occurred after confirmaotn and so would not have been property of Chatpter 7 estae in first insance. SEcction 541 defien sproerty of estate to include certain post-petiotn assets but post-petiotn personal injry proceedsa re not included. Althogut property of estate, post-petiton PI claim is not included in liquidation analysis.Hoever, Eleventh circuit also adoprdd "non-sttutory ability -to-pay" test to ensure Debtor acocnts for post-petiotn improvement sin financial condition. Where Debtor acquires post-petiotn assets, cresitors sharwe in unanticipated appreaiton in assets with regard to either disposable income or liquidation standards.However, Debtor not required to modify plan and commit proceeds where proceeds do not enhance debtor's fianncal condition but rather comepnsatie for other losses including paind and suffering. Unlike other winsdfalsls ushc as lottery winnings, life insurance proceeds or inheritances, which are "windfalls" that increase ability to pay.

In re Martin, Case No. 22-24419 (Bankr. W.D. Tn. 2023) – Exempt proceeds of pre-petition personal injury action are not disposable income in Chapter 13. At commencement of case, Debtor had pending personal injury case. Debtor claimed $7,500 exempt. After confirmation, Debtor settled the matter and received $7,500.00. Trustee made oral motion for turnover of proceeds claiming proceeds as disposable income for payment to creditors, asserting that funds were not necessary for debtor's maintenance of support. Proceeds not disposable income required to be turned over to trustee to extent of exemption. Disposable income determined using CMI less reasonably necessary expenses which would not sweep in post-petition "income" (although Court did not cite *Connor v. Carroll,* 463 BR 14 (6th Cir. 2012)) while "best interest of creditors" is based on liquidation in hypothetical Chapter 7. Claim is listed on Schedule A/B as "asset" and proceeds would be "assets", not income. While proceeds of pre-petition personal injury would be property of Chapter 7 estate, Debtor lawfully claimed proceeds exempt to full extent allowed which covered all proceeds. There are no proceeds in excess of exemption and so no proceeds that would have been available for payment to creditors in Chapter 7.

XIII. Relief From Order – Rule 60(b)(1)

In re Curare Laboratory, LLC, 2023 WL 4044473 (6th Cir. BAP 2023) – Authorization to file bankruptcy petition governed by Corporate Operating Agreement. Agreement required approval by 85% of members. Evidence unconverted that Corporation had not conducted member's meeting or vote prior to bankruptcy filing and person who purported to sign petition lacked authority to do so. Corporation's effort two days post-dismissal to "ratify" filing was not basis under Rule 60(b) for relief from dismissal order. Rule 60(b)(1) allows Court to grant relief for mistake, inadvertence surprise or excusable neglect which generally focuses on mistakes and neglect by parties or counsel in conduct of the litigation such as (i) proceeding to trial under mistaken assumption of issues to be tried; (ii) attorney lacking authority for settlement of litigation; (iii) appeal not timely filed; (iv) deadline missed due to ambiguous, misleading local rule; (v) ignorance of local procedures; (vi) failure to appear at trial; (vii) inability to hire counsel or communicate with court; and (viii) procedural errors by lay parties. Relief not granted for willful or deliberate conduct. Primary "mistake" was not filing was without corporate authority,

but that Debtor chose not to try to fix problem until after case was already dismissed although Debtor knew for 8 months prior to dismissal and three months before evidentiary hearing that authority was disputed. Case dismissed without prejudice to Debtor filing with proper authorization.

XIV. Chapter 13 Dismissal or Conversion – Trustee Fees

Harmon v. McCallister, 2021 WL 3087744 (9th Cir. BAP 2021) – Adopting minority position, court concluded that Trustee entitled to trustee fee on payments received before confirmation even if case dismissed pre-confirmation. Specific direction of 28 USC Section 586(e)(2) requires standing trustee to collect percentage fee from all payments received. Once trustee collects fee, payment has already been made to trustee. Plain meaning is not that a standing trustee gathers fee and holds it pending some future event, but rather Trustee obtains payment of statutory charge when Trustee collects fee from each payment under plan. Interpretation that fee remains part of plan payments necessarily contravenes directive that trustee collect fee from plan payment; and interpretation that fee is collected at confirmation contravenes directive to collect fee from payments.

Nardello v. Balboa, 514 BR 105 (D.N.J. 2014) – Chapter 13 Trustee compensation controlled by 28 USC Section 586 which provides for Trustee to take percentage fee from all payments received. Trustee fee not limited to or constrained by funds paid to creditors and Trustee is entitled to fee on all funds received even if case dismissed as fees are not based on disbursements to creditors. Section 1326 allows fee to be taken before or at time of disbursement to creditors, indicating that Trustee fee is not dependent on payment to creditors.

Soussis v. Macco, 2022 WL 203751 (E.D.N.Y. 2022), the District Court held that the Trustee is entitled to the percentage fee regardless of whether the Plan is confirmed. The parties appealed to the Second Circuit and that matter is pending (the docket reflects that the matter was fully briefed last August but does not reflect an oral argument date).

In re Doll, 57 F.4th 1129, *rehg en banc denied,* ____ F.4th ____, (10th Cir. 2023), the Tenth Circuit concluded that the Chapter 13 Trustee must disgorge the percentage fee received if the Plan is not confirmed. 28 USC Section 586 provides for the Trustee to collect a fee based on a percentage of the payments the Trustee received from the Debtor for disbursement to creditors under a confirmed Plan. However, Section 1326 controls how the payments to the Trustee are disbursed and provides "If a plan is not confirmed, the trustee shall return any such payments … to the debtor". Tenth Circuit concluded that Section 586 and Section 1326, "read together, unambiguously require a Chapter 13 Standing Trustee to return pre-confirmation payments to the debtor without deducting the trustee's fee when no plan is confirmed". The Court noted that while Trustees in Chapter 12 and Subchapter V of Chapter 11 are specifically authorized to deduct their fees before returning pre-confirmation payments to the Debtor, that provision is conspicuously absent from Section 1326.

In re Baum, 2023 WL 3284625 (Bankr. E.D. Mi. 2023) – Trustee entitled to retain fees in pre-confirmation dismissal, rejecting *In re Doll* and adopting *Harmon v. McCallister, Nardello v. Balboa and Soussis v. Macco.*

XV. Appeals

In re Baum, 2023 WL 4055338 (Bankr. E.D. Mi. 2023) – 28 USC Section 158(d)(2) allows Court on own motion to certify direct appeal to Court of Appeals. Court would not exercise discretion to certify appeal where there was no "order or decree" that had been appealed. Notice of Appeal must identify judgment, order or decree being appealed and must attach copy of judgment, order or decree being appealed. Notice of Appeal identified "judgment, order, or decree appealed from" as "Opinion Re § 349(b)(3) & § 1326(a)(2)" entered May 5, 2023, and linked Notice of Appeal to May 5 Opinion and attached copy of May 5 Opinion to Notice of Appeal. Deadline to appeal Order of Court passed with no notice of appeal being filed.

XVI. Chapter 13 Dismissal or Conversion – Funds on Hand With Trustee

In re Davenport, 2023 WL 2620040 (Bankr. W.D. Mi. 2023) – When Chapter 13 case is dismissed, Court should limit effects of case and *in rem* jurisdiction over property formerly within estate, returning the parties to prior positions as far as possible, governed by applicable non-bankruptcy law. Court rejected attorney's effort to use "cause" under Section 349 to have fees paid rather than returned to Debtor. Court would not provide Counsel with bankruptcy related advantage over debtor or other creditors. Trustee directed to turn funds over to Counsel to be placed in Trust account for safe-keeping and allow State Court to determine relative rights of parties and creditors.

In re Velasco-Rodriguez, 2021 WL 136663 (Bankr. E.D.N.Y. 2021) - At dismissal before confirmation, mortgagee is entitled to recover mortgage payment in proposed plan and amounts advanced for taxes and insurance for period after mortgagee filed motion for adequate protection Mortgagee not entitled to payments for the months between the petition and the motion for adequate protection during which debtor and mortgagee unsuccessfully attempted mortgage modification. Granting retroactive relief by awarding adequate protection payments for months before lender sought adequate protection not appropriate absent exceptional circumstances. Creditor waited unusually long time in relatively simple chapter 13 case to request adequate protection. While Plan requires the Debtor to make hoped-for mortgage payments to Trustee, Plan does not contain a directive that those payments go to the lender.

In re Nelums, 617 B.R. 70 (Bankr. D.S.C. 2020) - Distinguishing *Harris v. Viegelahn*, 575 U.S. 510, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (May 18, 2015), and consistent with local rules and § 1326(a)(2), at dismissal before confirmation Chapter 13 trustee appropriately paid attorney's fees as an administrative expense under Sections 503(b) and 330(a)(4)(B) and then returned the balance on hand to debtor. Majority of courts have held that Section 1326(a)(2) controls disbursement of funds held by Chapter 13 Trustee upon the preconfirmation dismissal.

In re Leckman, Case No. 16-48671 (Bankr. E.D. Mi. 2022) – Counsel entitled to payment of fees where case dismissed after confirmation. Following *Bekofske v. Marve,* 2020 WL 11622509 (E.D. Mi. 2020)*, "*cause" under Section 349 requires only some "acceptable reason" to reallocate funds and does not require showing that Debtor engaged in bad faith or other misconduct. "Cause" existed to allow the Trustee to pay Counsel's fees for services performed in effort to save case

from dismissal as long as services were reasonable at time performed and were performed at time when saving case may have been possible. Motion for Cause under Section 349 must be served on entire creditor matrix and not just ECF participants as other creditors may also want to lay claim to funds should creditor desire to assert independent "acceptable reason" for creditor to be paid from funds on hand at dismissal.

Bekofske v. Marve, 2020 WL 11622509 (E.D. Mi. 2020) – Unpaid administrative expenses constitute cause under Section 349 for funds on hand with Trustee to remain property of estate. Cause language of Section 349 is not high threshold of bad faith but merely requires good reason to reallocate funds; cause is not limited to bad faith, referring to *Bateson* as "outlier"; and administrative expenses are not debts that precede case but are generated solely because Debtor filed Chapter 13 and statutory goal of putting parties in same position as before case filed would not be met by denying counsel legal fees that would not have been incurred but for Chapter 13 proceeding.

In re Elms, 603 BR 11 (Bankr. S.D. Ohio 2019) – Trustee must return to Debtor all funds on hand as of dismissal of Chapter 13 case. Distinction between conversion of case to Chapter 7 and dismissal of case post-confirmation does not warrant different conclusion as to disposition of funds held by Trustee. Dismissal of case generally unwinds all transactions that occurred during case as far as practicable. Trustee cannot make distributions after dismissal from funds received from 3rd-party recoveries and sources as there was no basis to distinguish those payments from wages. Returning funds to Debtor is consistent with premise that participation in Chapter 13 proceeding is voluntary.

In re Evans, 618 BR 493 (Bankr. E.D. Mi. 2020) – Adopting reasoning in *Arnold*, when Chapter 13 case is converted to Chapter 7 before confirmation, *Harris* does not control. Section 1326 requires Trustee to distribute funds on hand to pay attorney's fees in advance of returning funds to Debtor. Court had authority to enter order directing Chapter 13 Trustee to pay attorney's fees from funds on hand as of conversion

In re Arnold, 618 BR 822 (Bankr. E.D. Mi. 2020) – When Chapter 13 case is converted to Chapter 7 before confirmation, *Harris* does not control. Section 1326 requires Trustee to distribute funds on hand to pay attorney's fees in advance of returning funds to Debtor. Court had authority to enter order directing Chapter 13 Trustee to pay attorney's fees from funds on hand as of conversion

In re Montilla, 2022 WL 12165276 (Bankr. N.D. Ill. 2022), *certification for direct appeal filed* ___ WL ___ (7th Cir. 2022) – Undistributed plan payments in hands of Trustee at date of conversion may not be used to pay attorney fees and must be refunded to Debtor. Absent bad faith conversion, funds received from post-petition plan payments are no longer property of Chapter 13 estate and do not belong to Chapter 7. Upon conversion, Section 348 brings complete end to trustee's role in case. *Harris* not limited to post-confirmation conversion. Court specifically rejected *In re Arnold* and *In re Evans* out of Eastern District and adopted *In re Post* from the Western District. More persuasive viewpoint followed by the majority of bankruptcy courts is that *Harris* applies to every converted case and chapter 13 trustees are obligated to give postpetition funds back to debtors without making administrative expense disbursements to

former counsel. Counsel has Section 503(b) claim against Chapter 7 estate but no right to payment from Chapter 13 estate.

XVII. Property of Estate

Gold v. Warr, 2023 WL 4144643 (Mich. Ct. App. 2023) – Bankruptcy Trustee lacks standing to bring action for alleged malpractice by Debtor's counsel where cause of action while based on counsel's actions prior to commencement of case did not result in harm until after commencement of case when Debtor was denied discharge. Malpractice action did not accrue until after commencement of case. No party could have brought action against counsel as of petition date and post-petition assets are not vested in Trustee.

XVIII. Joint Ownership

In re Nakishin, 644 B.R. 402 (Bankr. N.D. Ill. 2022). When debtor who owns real estate jointly (not as tenants in common) dies during the bankruptcy, and the other joint owner is not in bankruptcy, the joint ownership interest leaves the estate and goes to the non-bankrupt joint owner – the Chapter 7 trustee cannot have greater rights than the deceased debtor.

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018) – Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Debtor's interest in property is determined by State law. Although Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, provision does not elevate Estate's interest to greater standing that Debtor had but for bankruptcy filing. Debtor and spouse owned second home as joint tenants with rights of survivorship. When Debtor passed away post-petition, Debtor's interest in property passed immediately to surviving spouse by operation of law, and Estate no longer had interest in property. Trustee lacked ability after death of Debtor to sell Debtor's interest in property as Debtor no longer had interest that was property of estate. Rule 1016 which allows case to continue following death of Debtor does not alter substantive rights of bankruptcy estate. "Transfer" to spouse was not governed by or limited by Section 363 as that section applies onto to sales of estate interest by Trustee, not transfers by operation of State law. Strong Arm powers under Section 554 did not allow Trustee to avoid transfer to spouse as Section 544 allows trustee to avoid status of creditors, and spouse was not creditor of estate and there was no "transfer" to be avoided as at death Debtor's interest in property ceased to exist and Spouse retained her interest in entire property. Trustee could not assert status as hypothetical lien creditor of Debtor as applicable state law specified that upon death of one joint owner, any liens that may have existed on interest of deceased tenant terminate and co-owner becomes owner free and clear. Trustee could not avoid lien and bona fide purchaser as there was no transfer to avoid.

XIX. Dischargeability – Section 523

Industrial Development Authority of Town of Front Royal v. Poe, 2023 WL 4359972 (Bankr. E.D. Va. 2023) - Section 523(a)(4) excepts from discharge any debt resulting from larceny. Section 523(a)(4) does not require that Debtor committed larceny. Citing *Bartenwerfer*, Court concluded wrongdoing imputed to only to partners or agents. Larceny exception to discharge did not apply

to Debtor who was neither partner with nor in agency relationship with wrongdoer. Debtor was "unwitting pawn" in transaction that allowed Debtor's Friend to steal $285,000.00 from Friend's employer. Although Debtor exhibited "extreme bad judgment" there was no evidence that debtor was aware that property tilted in Debtor's name had been purchased with stolen funds.

Bartenwerfer v. Buckley, 143 S.Ct. 665 (2023) – Actual Fraud focuses on fraudulent act without respect to any specific actor, intent or culpability. As long as debt resulted from someone's fraud, the identity of the fraud doer does not limit the scope of liability. Fraud may be imputed to third party based on agency or partnership under applicable state law. Fraud will not be imputed to otherwise faultless individual absent some special relationship between parties, but even then innocent party may not be liable where actions are taken outside authority or ordinary course of business. Debtor and her then-boyfriend (later spouse) jointly purchased home to remodel and "flip". Debtor took no role in project, leaving all details to spouse including retention of architect, structural engineer, designer, and general contractor; monitoring work; reviewing invoices; and signing checks. Debtor and spouse later sold property and signed affidavit that they disclosed all material facts relating to property. After closing, buyer discovered multiple defects, sued Debtor and spouse in State Court and obtained Judgment. Court concluded that while Debtor had no involvement in construction and had no knowledge of any defects, debt was non-dischargeable where spouse clearly had knowledge of undisclosed defects yet signed affidavit attesting to lack of defects. Debtor and spouse were partners in project and spouse's actions were within scope of authority or within ordinary course, and Debtor received proceeds of sale, such that debt resulting from fraud would be non-dischargeable as to Debtor as well as spouse.

In re Vulaj, 2023 WL 3764662 (Bankr. S.D. Ca. June 1, 2023) – Spouse fraudulently transferred property to spouse who later filed. Fraudulent intent of transferor would not be imputed to transferee merely because parties were married. Imputation requires relationship that at state law provides for vicarious liability, such as partnership or agent-principal, not merely because parties are married.

In re Mann, 646 B.R. 444 (Bankr. N.D. Ohio 2022). Old people caught up in a gift-card scam

In re GFS Industries, LLC, 647 B.R. 337 (Bankr. W.D. Tex. 2022). Exceptions to discharge in bankruptcy applied to discharge under Subchapter V, but only as to individual debtors.

Cantwell-Cleary Co. v. Cleary Packaging, LLC, 2022 WL 2032296 (4th Cir. 2022) – Reference in Section 523 to exception from discharge of "an individual debtor" does not limit scope pf non-dischargeability solely to individuals. Section 1192(2) provides that discharge includes all debts except any debt of the kind specified in Section 523(a). Subchapter V defines "debtor" as "person engaged in commercial or business activity that has not more than $7.5 million in debt. "Person" is defined in Section 101(9) to include individuals and corporations. Section 1192 provides for discharge of debts of both corporate and individual debtors and all debtors individual or corporate are subject to exceptions to discharge under Section 523.

XX. Exemptions

Redstone Federal Credit Union v. Brown, 2019 WL 582459 (N.D. Al. 2019) – Exemptions are determined by law in effect on petition date, not date on which underlying debt was incurred.

Barclay v. Boskoski, 52 F.4th 1172 (9th Cir. 2022) – Exemptions determined on Petition Date, not date on which Judgment Lien attached by recording pre-petition.

In re Gomez, 646 B.R. 523 (Bankr. D. Colo. 2022) - Homestead exemption at the time of filing applied, not the greater amount at the time of the amendment to Schedule C.

XXI. Amended Exemptions

In re Wantz, 2023 WL 180736 (Bankr. W.D. Mi. 2023) – Debtor has right to amend schedules and add exemption at any time before case closed, but once case closed, Debtor does not have right to reopen or to amend exemptions. Debtor did not have procedural right to amend schedules and claim exemption in personal injury action where case was fully administered and closed prior to amendments. Court has discretion under Rule 9006 to extend time to file exemption in reopened case as long as failure to claim exemption before closing was result of excusable neglect, taking into account all relevant circumstances including prejudice to debtor, creditors and estate, length of delay, impact on judicial proceedings, reason for delay, whether delay was within reasonable control of debtor, and whether debtor acted in good faith. Failure to disclose was prejudicial to Trustee who was denied opportunity to administer property of estate by selecting counsel, participating in litigation, or decision making. Prejudice to Estate and Creditors was minimal as Debtor had unused exempt that would have covered personal injury claim had exemption been timely asserted. There was no evidence that litigation could have been settled for higher amount than that received by debtor or that amount would have been sufficient to provide dividend to creditors. 3-year delay between initial petition and date of Motion to Reopen was significant, but explained where debtor was unaware of claim against medical device manufacturer until diagnosed by physician shortly before case reopened. Debtor lacked sophistication and was confused by medical terms and was not aware of potential recovery until action settled and she recovered damages. Debtor evidenced good faith through sincere, credible and emotional testimony and took reasonably prompt action to disclose once debtor became aware of settlement and proactively sought to reopen rather than just remain silent. Policy supported allowing exemption where Debtor has continued to experience medical issues related to device with out-of-pocket costs far in excess of exemption, leaving debtor with pain and suffering through no fault of her own.

XXII. Exemptions – Retirement Accounts

In re Majeski, 2023 WL 3395009 (Bankr. E.D. Mi. 2023) – Debtor permitted to exempt portion of tax refund representing return of penalty incorrectly imposed when Debtor withdrew funds from IRA. Funds represented refund of early withdrawal credit imposed when Debtor, permanently disabled, withdrew funds from IRA before age 59 ½. Debtor could not re-deposit funds into IRA. Debtor would have been permitted to exempt funds had they remained in IRA and funds were directly traceable to funds withheld from IRA distribution. Funds retained exemption as Section 600.5451(1)(k) specifically allows exemption of payments and distributions from IRA

In re Kelly, 2023 WL 2903988 (Bankr. N.D. Iowa 2023) – *Rameker* limitation on inherited IRA does not apply where IRA is inherited by spouse of person who funded IRA. Opt Out state does not preclude Debtor from using Section 522(b)(3)(C) to exempt IRA. After spouse died, Debtor rolled

over IRA into her own name which afforded IRA same tax advantage and subject to same restrictions s IRA in first instance. While surviving souse has option to either roll over IRA or leave IRA as inherited IRA, if IRA is not rolled over and maintained as inherited, IRA subject to different tax rules which removes IRA from scope of exemption.

Villavicencio v. Terlecky, 2023 WL 1070236 (S.D. Ohio 2023) – Under IRA guidelines, when fiduciary in control of IRA assets engages in prohibited transaction, account ceases being qualified retirement account as of first day of year of prohibited transaction. Prohibited transactions include use of IRA assets for personal benefit. Debtor established IRA using funds rolled over from prior employment. Debtor then transferred funds from IRA to bank account of Debtor's wholly owned LLC and then had LLC purchase property that Debtor occupied as residence. Debtor's use of the property violated IRS regulation against using IRA property for self-benefit resulting in termination of IRA qualified status prior to commencement of Bankruptcy case. Debtor's claimed exemption in IRA overruled as IRA was no longer "qualified" retirement plan. "Good faith" exception applies when qualified status lost due to technical errors made by plan drafters or administrators, not to Debtor's own blissful ignorance, inattention or indifference to requirements of law.

In re Hoffman, 22 F.4th 1341 (11th Cir. 2022) – Tax qualified Roth IRA is not property of estate.

In re DeVries, 2023 WL 2623217 (Bankr. N.D. Ohio 2023) – Funds withdrawn from 401k retain exemption if funds withdrawn if reasonably necessary to support Debtor or dependents and withdrawal is due to illness, disability, death, age or length of service. Debtor withdrew funds and purchased new vehicle one year prior to filing. Funds withdrawn from 401k lost exempt status when Debtor used proceeds to purchase car such that car could not be exempt proceed. Purchase of car was reasonably necessary for support of Debtor and dependents but withdrawal was not on account of illness, disability, death, age or length of service. Debtor was steadily employed, just 41 years of age, in good health, and with no intention of retiring. Debtor had monthly net income after expenses is $600.46. Facts did not indicate that Debtor used funds in manner reasonably certain to benefit Debtor in retirement. While funds may have retained exempt status when first deposited into bank account and traceable, once funds were taken out of bank and used to purchase vehicle, exemption ceased. When liquid exempt funds are transformed into illiquid form, exemption no longer applies in illiquid asset.

In re Perkins, 2023 WL 2816687 (Bankr. S. D. Tx. 2023) – 401k contribution deducted in calculating disposable income without limitation – compare to Davis in 6th which limits contributions to amounts regularly contributed in 6 months pre-petition.

XXIII. Social Security

In re Williamson, 2023 WL 2144534 (Bankr N.D. Ohio 2023) – Debtors are not required to include Social Security Income in calculating projected disposable income. Calculation of Projected Disposable Income begins with calculation of Current Monthly Income which excludes SSI. Once CMI calculated, then Debtors deduct reasonably necessary expenses if below-median, or IRS guidelines if above-median, to arrive at Disposable Income. Disposable Income may then be adjusted by any known or substantially certain changes in income or expenses to arrive at

Projected Disposable Income which is amount required to be paid to unsecured creditors. Debtors are not required to first use Social Security to pay their monthly living expenses to free up non-SSI income for payment to creditors. Nothing in Code factors in SSI and nothing requires Debtors to first use SSI to pay living expenses. Although Schedule I listed SSI, listing income on Schedule I did not "transform" SSI into projected disposable income. While disclosure of SSI is important for other reasons – to determine whether Debtor has "regular income" for purpose of Section 109, for example – and while Debtors may voluntarily contribute some portion of SSI as needed, they are not required to include any amount of SSI that they do not voluntarily contribute. In short, Debtors do not violate Section 1325(b) by holding back some or all of their SSI. Holdback of SSI was not evidence of bad faith. General concept of "good faith" does not substitute for mathematical formulas adopted by Congress in calculating projected disposable income and Debtor does not lack "good faith" merely by doing what the Code commands.

In re Meehean, 611 BR 574 (Bankr. E.D. Mi. 2020), *aff'd,* 2020 WL 4783299 (E.D. Mi. 2020) - Social Security income is not considered in calculating "projected disposable income" under Section 1325(b)(1)(B). However, Debtor's exclusion of Social Security income must also meet good faith requirement under Section 1325(a)(3). Good faith turns on totality of circumstances including ability to pay creditors and whether Plan amounts to sincerely intended repayment of prepetition debt consistent with Debtor's available resources, taking into account amount of income of Debtor and Debtor's spouse from all sources; regular and recurring living expenses for Debtor and dependents; attorney's fees to be awarded in case and paid by Debtor; probable or expected duration of Plan; motivation of Debtor and sincerity in seeking relief; ability of Debtor to earn and likelihood of future increase or diminution in earnings; special circumstances such as inordinate medical expenses; frequency with which Debtor has sought bankruptcy relief; circumstances under which Debtor contracted debt and good faith in dealing with creditors; whether amount or percentage of payment offered would operate or be mockery of honest, hard-working, well intended Debtors who pay higher percentage of claims consistent with purpose and spirit of Chapter 13; burden of case administration on Trustee; and rehabilitative provisions of Bankruptcy Reform Act. Debtors could not confirm Plan which provided for zero dollar payments per month and paid creditors nothing where Debtor's income including Social Security was sufficient to pay all of Debtor's living expenses and pay creditors in full in 42 months. 42 USC Section 407 exclusion of Social Security from operation of any bankruptcy law excludes third parties compelled acquisition of someone else's Social Security benefits. Good faith test of Section 1325 requires Debtor to demonstrate good faith if Debtor wishes to receive benefits of Chapter 13, no different in principle than Social Security beneficiary's decision to use benefits to purchase anything of value. Social Security is not immune from paying restaurant bills or other living expenses merely because cash to pay bill came from Social Security. Section 407 does not give Debtor immunity from demonstrating good faith as precondition to confirmation of Plan even if demonstrating good faith requires including some or all Social Security benefits.

XXIV. Discharge Injunction and Rule 3002.1

In re DeWitt, 644 BR 385 (Bankr. S.D. Ohio 2022) – Lender violates discharge injunction when Lender files post-discharge foreclosure proceedings based on unpaid tax advances made during bankruptcy case. Contempt requires that creditor (i) have actual notice of order alleged to have

been violated and (ii) creditor with knowledge took actions in contravention of requirement of Order. Lender had actual notice of the discharge –Lender admitted as much. Lender did not violate discharge where Lender sought only to enforce *in* rem rights by starting foreclosure proceedings, without attempt to recover from Debtor personally; and there was no evidence that Lender misapplied any payments received during the Chapter 13 as Lender applied those payments to principal and interest as required. Lender would have violated Section 524 had Lender applied any of the payments to post-petition taxes without having filed Rule 3002.1 Notice, but Lender did not do so. Lender did not take any action inconsistent with Lender's rights under note and mortgage which specifically allowed Lender to advance for unpaid taxes and to recover those advances. Lender's non-compliance with Rule 3002.1 did not amount to a discharge violation preventing Court from awarding sanctions for contempt.

In re Seaver, 640 B.R. 555 (Bankr. D.S.C. 2022). Title Max was in civil contempt for non-compliance with confirmed plan by failing to surrender title to vehicle to debtor free and clear of liens upon entry of discharge, as provided in the confirmed Chapter 13 Plan

XXV. Judicial Estoppel

MOAC v. Transformco, Stanley v. FCA US, LLC, 51 F.4th 215 (6th Cir. 2022) - Judicial estoppel bars an undisclosed suit when: (1) debtor assumed position contrary to one asserted under oath in bankruptcy; (2) bankruptcy court adopted contrary position either as preliminary matter or as part of final disposition; and (3) debtor's omission did not result from mistake or inadvertence. Debtor's action for alleged violation of Family Medical Leave Act barred where Debtor did not disclose action in bankruptcy schedules. Debtor was fully aware of claim where Debtor had filed grievance before bankruptcy filing yet did not disclose claim in either Schedules or Statement of Financial Affairs. Bankruptcy Court relied on representation that Debtor did not have cause of action in confirming Chapter 13 Plan. Estoppel will not preclude claim where non-disclosure was inadvertent, taking into account whether: (1) debtor had knowledge of facts underlying undisclosed claims; (2) debtor had motive to conceal undisclosed claims; and (3) omission was made in bad faith. Debtor had knowledge of facts underlying the undisclosed claims as Debtor had already invoked Union's grievance process. Debtor had material interest in non-disclosure even where Debtor's Plan required 100% repayment to creditors where Chapter 13 filed to consolidate debts, place debts "on hold" and avoid foreclosure. Process requires Debtor to proceed in good faith. Court, Trustee and Creditors can make informed decision only if Debtor accurately discloses assets or makes amendments as needed to disclose potential causes of action. Had Debtor disclosed cause of action, Court and creditors may have taken less favorable approach to Chapter 13 and Debtor stood to benefit from omitted claims. Omission is in bad faith where Debtor submitted amended schedules to disclose cause of action only after Defendant's counsel questioned Debtor about omission and sent demand letter raising judicial estoppel argument. Late disclosure omitted any estimate of value of suit although Debtor had made demand on Defendant for more than $600,000 in damages. Late, perfunctory disclosure does not overcome appearance of bad faith. While judicial estoppel may allow wrongdoer to "get away with it" Debtor cannot be excused from duty of truthfulness and candor.

XXVI. Denial of Discharge – Section 727(a)(2)

In re Wylie, 649 BR 852 (Bankr. E.D. Mi. 2023) – Section 727(a)(2)(B) allows Court to deny discharge where Debtor transfers property of estate after commencement of case with intent to hinder, delay or defraud Trustee or Creditors. Property of estate includes tax refunds for years preceding commencement of case where the refund has not been received by Debtor as of Petition date. Debtors "transferred" their interest in prior year's tax refunds when Debtors, three weeks post-petition, filed tax returns directing IRS to withhold refund and apply to following year's potential tax liability. Focus is on Debtor's intent, not actual effect. Debtors' decision to defer tax refunds could potentially have hindered Trustee in recovery of tax refunds by delaying receipt of refunds for one year and by requiring Trustee to engage in lengthy litigation with IRS to recover refunds. While Trustee did not in fact suffer any delay as Debtors ultimately turned over refund amount, potential delay sufficient to warrant denial of discharge. Debtors admitted that purpose of deferring refund was to make sure following year's tax liabilities were paid effectively seeking to divert property of estate that would be for benefit of all creditors and instead preferring one creditor. Transfer wholly inconsistent with objective of Chapter 7 to administer assets of estate which included tax refund.

XXVII. Avoidance Actions

Hall v. Meisner, 51 F.4th 185 (6th Cir. 2022) – County's taking of title as payment for property tax delinquencies that amount to mere fraction of value of property violates Takings Clause of Fifth Amendment. Allowing County to take property deprived Plaintiff of property including equitable title without public auction and without payment. Property owner's interest in property is not limited to surplus proceeds after foreclosure sale, as owner's rights exist in property prior to and at time of foreclosure sale and do not materialize only after property sold. While decision may have serious fiscal impact, County forcibly took property worth vastly more than debt and did not refund any of the excess.

Lowry v. Southfield Neighborhood Revitalization Initiative, 2021 WL 6112972 (6th Cir. 2021) – Debtor may contest otherwise property concluded property tax sale as fraudulent transfer. *Rooker-Feldman does* not preclude Federal Court review of prior state court judgment confirming foreclosure sale as State Court Judgment is independent from cause of action under Section 548. Amount paid bore no relationship to value of property precluding application of *BFP v. Resolution trust Corp.* Treasurer sold property to City of Southfield for amount of taxes owed, which was roughly 10% of value of property. Tax foreclosure process allows local government to purchase property by paying amount of outstanding taxes due, with no relationship to value of property and no opportunity for competitive bidding by other interested parties.

XXVIII. Avoidable Transfers – Federal Debt Collection Practices Act

In re Spencer, 2023 WL 2563751 (Bankr. S.D. Il. 2023) – Federal Debt Collection Practices Act defines "property" much more broadly than state law and may be utilized by Trustee to reach interests that are not property under state law and may use 10-year statutory lookback of actual Federal creditor such as IRS existed. Trustee permitted to set aside Debtor's "disclaimer" of inheritance although under State law disclaimer is not transfer as heir deemed never to have received any interest in disclaimed property.

XXIX. *In Pari Delicto*

Iammartino v. Lake City Bank, 2023 WL 3746537 (Bankr. W.D. Mi. 2023) – Person sued by Trustee in bankruptcy may assert *in pari delicto* defense against non-bankruptcy claims if jurisdiction whose law created claims permits defense outside of bankruptcy. Doctrine bars claims by those who have themselves violated law in cooperation with defendant. Claims against bank had origins in Debtor's actions in check-kiting scheme in which Debtor's principal and related company played starring roles by uttering and depositing checks at issue. Doctrine subject to "adverse interest" exception where corporation has been hijacked by corporate actors with interests adverse to corporation such that knowledge of agent cannot be imputed to corporation itself. Averse interest exception subject to exception where corporate villain wholly owned and controlled corporation such that it is not possible to separate intent of action from intent of corporation unless there is someone else in company, an innocent insider, who might have been able to stop corporation from committing bad acts that gave rise to *in parti delicto* in first place. While defense at first blush seemed compelling, Court would not apply at early stages of case. Application requires court to weigh or balance fault, inherently factual exercise ill-suited to motion addressed to pleadings. Doctrine requires court to conclude that plaintiff was at least equally at fault with defendant which is not possible while considering Motion to Dismiss. Exceptions and exceptions to exceptions to *in pari delicto* doctrine generally address whether or to what extent agent's motive or scienter is to be imputed to plaintiff or its predecessor in interest. Applicable state law not clear how doctrine would apply where original wrongdoer has been removed and replaced such as by Trustee in bankruptcy. Court need not apply the doctrine at earliest stages of proceeding on an inadequate record, even if defense seems eminently plausible or well-suited.

Gold v. Warr, 2023 WL 4144643 (Mich. Ct. App. 2023) – Michigan courts have long recognized that claim is generally barred to extent based on plaintiff's own illegal conduct. Conduct must be prohibited or almost entirely prohibited under penal or criminal statute and sufficient causal nexus must exist between plaintiff's illegal conduct and plaintiff's asserted damage. Debtor brought legal malpractice case against Debtor's prior bankruptcy counsel arguing that counsel's non-disclosure of multiple transfers from Debtor to Debtor's daughter resulted in Debtor being denied discharge. Debtor willingly and knowingly participated in obfuscation of assets and efforts to protect assets by transferring them on eve of filing bankruptcy. Debtor's conduct was prohibited by criminal statutes governing bankruptcy fraud. While Debtor allegedly provided information to Counsel who did not include disclosures in bankruptcy documents, ultimate failure to disclose fell to debtor. Debtor could not rely on advice of counsel where Debtor admittedly perjured herself in non-complex matter. Wrongful conduct rule barred Debtor's claim for legal malpractice based on Debtor's own illegal conduct demonstrated on the face of complaint.

XXX. Avoidable Transfers – Date of Transfer

Warsco v. Creditmax Collection Agency, Inc., 56 F.4th 1134 (7th Cir. 2023) – Federal law, not state law, defines "transfer" and determines when transfer occurs. Garnishment of wages occurs when funds are transferred or paid, not when Writ signed or date garnishee learns of garnishment.

Garnishment of wages occurs when employer who withholds funds transfers funds to garnishor. Garnishment Order is instruction to employer to act certain way but events may happen after service of Order that affect whether money is transferred. Date of transfer is date on which money passes to creditor's counsel.

XXXI. Avoidable Transfer – Support of Adult Child

In re Martino, 2023 WL 3828486 (Bankr. E.D.N.Y. 2023) – Allowing Debtor's adult-child to reside in Debtor's home rent-free and providing Child with "room and board" are not "transfers" within scope of Section 548. Trustee ignored that Debtor's non-filing spouse was wage earner and owner of home with Debtor and some significant part of alleged value was property of non-filing spouse not subject to avoidance. Trustee offered no evidence to determine value of "property" transferred - bedroom occupied by Child in Debtor's house - or evidence that Debtor had right to rent room to third party. Trustee did not provide any analysis of how te alleged Room and Board "transfers" had any actual value in hands of Debtor so as to be of actual value to creditors; or that Debtor expended any additional funds to support Child living at home. Mortgage payment would remain same regardless of whether Debtor lived in family home, and even if monthly grocery or utility bills were fraction higher than had Child not lived at home, Trustee did not providing any actual evidence beyond estimate at $22,000. Child reimbursed Debtor for car payments and made additional contributions to household by purchasing household items for cash

XXXII. Chapter 13 - Right to Dismiss

In re Smith, 2020 WL 476013 (Bankr. N.D. Ohio 2020) – Debtor does not have absolute right to dismiss Chapter 13 case where record indicates that Debtor is manipulating the system. Even if Debtor has absolute right, Court retains power to sanction bad conduct such as bar to refiling, preventing discharge of debts in future cases, and requirement that Debtor seek court approval before commencing new case. Debtor's conduct in filing and then virtually immediately dismissing multiple Chapter 13 cases solely for purposes of delaying foreclosure warranted sanction of *in rem* relief to Creditor.

Skandis v. Moyer, 2023 WL 2520521 (6th Cir. BAP 2023) – Although Debtor has absolute right to dismiss Chapter 13 that was not previously converted from Chapter 7, Debtor has no right to dismiss Chapter 13 after case has been converted to Chapter 7. Record indicated that Debtor first made request to convert after Court had entered order converting case. Debtor's vague statements at hearing on Motion to Convert that Debtor wanted to stay in Chapter 13 but if the Court was not going to allow case to stay in Chapter 13, that Debtor preferred dismissal without bar to refiling was not "request" to convert under Section 1307.

In re Powell, 644 BR 181 (9th Cir. BAP 2022) – Debtor's ineligibility to be debtor in chapter 13 does not preclude Debtor from voluntarily dismissing case.

XXXIII. Section 363 (Short)sales

Summerlin v. Turnage, 2023 WL 2496181 (W.D.N.C. 2023) - Where secured parties agree to "carve out" of sale proceeds, Debtor may claim exemption in amount carved out even if liens on property otherwise exceed value. Debtor owned home worth $190,000 encumbered by a

mortgage and tax liens that far exceed value. Trustee proposed to sell property, pay mortgage, then do 40% "carve out" before paying tax liens, to pay administrative expenses and distribution to creditors. Court concluded that carved out funds are subject to exemption. Creditors agreeing to carve out lose ability to direct how remaining funds are to be distributed. If Debtor cannot claim exemption, Trustee and secured creditors would engineer carve out that puts significant funds into estate for payment of administrative claims while providing minimal benefit to unsecured creditors and while displacing Debtor, a 72-year-old widow with income of roughly $2,000 per month. Carve out was not intended to benefit creditors but amounted to "tip" by taxing authorities to Trustee for selling home. Sale would produce no distribution to unsecured creditors, Trustee's Motion to Sell denied.

Brown v. Ellmann, 851 F.3d 619 (6th Cir. 2017) – Trustee can sell overencumbered property and retain "carve out" provided by lender for payment of administrative expenses without accounting to Debtor for value of carve out. Although Debtor claimed exemption in property there was no value to which exemption could attach. Creating carve out by Lender's willingness to accept reduced sum did not create equity in property to which exemption attached and did not prevent sale of property by estate free of claims of Debtor.

XXXIV. Automatic Stay

In re Parker, 644 B.R. 805 (N.D. Cal. 2022) – Confirmation of Chapter 13 Plan does not terminate Automatic Stay.

In re Stamps, 644 B.R. 760 (Bankr. N.D. Ill. 2022). Under confirmed Chapter 13 Plan, debtor's obligation to pay creditor's claim ceased when automatic stay was terminated as to its collateral.

In re Rose, 645 B.R. 253 (Bankr. M.D. Fla. 2022). Mortgagee did not violate the automatic stay by sending mortgage statements to Chapter 13 Debtor-mortgagor's nondebtor husband and by reporting missed payments to credit agencies

In re Nyamusevya, 644 B.R. 375 (Bankr. S.D. Ohio 2022). Inspections of Chapter 7 debtor's property following postponement of foreclosure sale did not violate the automatic stay. Nor was postponing the foreclosure sale a violation of the stay.

McNally v. Kingdom Trust Company, 2022 WL 2000789 (W.D. Ky. 2022) – Third party complaint filed against Debtor post-petition violates prohibition against commencement of action against Debtor.

In re Wright, 504 BR 871 (Bankr. E.D. Mi. 2022) – Creditor did not violate stay by proceeding with foreclosure sale where Property was owned solely by Debtor's non-filing spouse. Although Debtor resided in house, Debtor was not on title and because no proceedings had commenced for dissolution marriage Debtor had not acquired any martial property interest in property. Debtor's alleged contribution to mortgage payments and utility bills does not create a constructive trust in favor of Debtor. Constructive trust may be imposed where necessary to do equity or to prevent unjust enrichment where property has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or other similar circumstances which render it unconscionable for holder of legal title to retain and enjoy property. Constructive Trust is equitable remedy that does not exist until

Court imposes it. No Court had imposed constructive trust on property as of date of foreclosure sale and Debtor did not allege that her spouse obtained some advantage through fraud, misrepresentation or concealment or that it would be unconscionable for Spouse to retain and enjoy ownership. Even where evidence would support constrictive trust, court will not impose one where there are intervening interests of bona fide purchaser. Court would not retroactively create constructive trust. Purchaser at duly held foreclosure sale is bona fide purchaser whose interest cannot be cut off by imposition of constructive trust. Debtor's "mere possessory interest" did not amount to legal or equitable ownership and possession was incidental to fact that Debtor resided at property with permission of owner. Further, foreclosure sale did not deprive Debtor of possessory right where she remains in possession of the property and Husband retains redemption right.

Bayview Loan Servicing, LLC v. Fogarty, 39 F.4th 62 (2d Cir. 2022) – Naming Debtor as defendant in foreclosure action violates stay even where Debtor has no interest in property. Property was owned by LLC in which Debtor owned 99% membership interest. After LLC stopped paying mortgage, Lender commenced foreclosure proceedings naming LLC and Debtor as defendants. After Lender completed foreclosure and days before sale, Debtor file Chapter 7. Lender contended that there was no stay as Debtor did not own property. Curt held that Lender willfully violated stay. Debtor's possessory interest was property estate protected by stay. Sale was continuation of pre-petition action against debtor and was attempt to enforce judgment entered pre-petition. Creditor's actions can violate two separate provisions of Section 362 simultaneously, nothing in Section 362 make one violation exclusive as to others. Whether or not sale impacted Estate, action against Debtor personally was violation. Lender had no reasonably objective basis to believe that actions were lawful subjecting lender to damages including punitive damages for willful violation.

Connor v. Property Fund 629, LLC, 636 BR 507 (Bankr. M.D. Tn. 2022) – Automatic stay applies to stop eviction where property has previously been foreclosed and Debtor as of petition date had no interest in property but remained in possession. Retention of property alone is possessory interest which is property of estate and protected by Section 362. Party has affirmative duty to act where failure to do so would violate stay such as when party places into motion collection efforts pre-petition that will continue post-petition unless party takes action to stop further collections. Creditor must take necessary steps to halt or reverse pending State Court actions or other collection efforts commenced prior to the filing of petition, including garnishment of wages, repossession of automobile, foreclosure of mortgage or judgment lien and maintain or restore status quo as it existed at time of filing of petition. Post-petition eviction does not maintain status quo as discussed in *Fulton*. However, affirmative duty of attorney does not arise instantaneously upon being informed of bankruptcy filing where attorney had not been able to contact clients even after prompt and diligent inquiry and eviction occurred less than 30 minutes after attorney first learned of bankruptcy filing.

In re Hamby, 646 B.R. 865 (Bankr. N.D. Ga. 2022). Stay violation by foreclosure when the stay "arguably" applied – that is the Fifth Circuit standard according to *Hamby.*

In re Defeo, 644 B.R. 323 (D.S.C. 2022). Sanction ($3,000) for frivolous arguments made on appeal by Chapter 13 debtor's counsel were warranted, on top of the sanction ($10,000) for filing an action for violation of the automatic stay without adequate investigation.

In re Merlo, 646 B.R. 389 (Bankr. E.D.N.Y. 2022). Debtor's multiple filings pertaining to his property before foreclosure sales gave rise to a rebuttable presumption of a scheme to delay or defraud creditor, supporting in rem relief.

XXXV. Automatic Stay – Land Contracts

Buhler v. Davis, 2022 WL 17184617 (Bankr. M.D. Tn. 2022) – Under land contract, title to property remains in seller and is enforceable by forfeiture if buyer defaults. Forfeiture treats contract as terminated by buyer and allows seller to retain all payments and retake possession without necessity of legal action. Land contracts (also known as installment land sale agreements) are executory contracts under Section 365 as long as both parties have unperformed obligations, buyer to pay and seller to convey title. When debtor breaches agreement pre-petition, seller had no further duty, contract is no longer executory. Land contact called for monthly payments and for final balloon payment. Debtor (buyer) did not make last contractual payment, Debtor advised Seller that Debtor would not be able to make balloon payment, and Debtor did not make final payment, all of which constituted events of default. Contract terminated automatically without notice of default or any other action on party of seller. Debtor had no interest in property on petition date warranting relief from stay to permit State Court wrongful detainer proceedings to complete.

XXXVI. Automatic Stay – Domestic Proceedings

Kelsay v. Kelsay, 2022 WL 973003 (6th Cir. 2022) – Section 362 does not stay action to establish or modify domestic support obligation order. Domestic Support Obligation is debt that is in nature of maintenance or support without regard to whether the State Court specifically designated the award as such. After Debtor filed for bankruptcy, ex-spouse filed Motion in State Court to modify support order to account for past-due support. State Court Order increasing amount of support and order for Debtor's employer to withhold higher amount constituted establishment or modification of support within exception to stay. Contempt hearing based on non-payment would have violated stay but request for State Court to modify support to account for unpaid support is not contempt. Tax intercepts resulting from increased award did not violate stay under Section 362(b)(2)(F). However, non-filing spouse's attempt to recover unreimbursed medical expenses by filing Motion for Contempt violated stay as expenses were not in nature of support, warranting award of damages and attorney fees to Debtor and against ex-spouse.

In re Appalachian Basin Capital, LLC, 2022 WL 3970956 (Bankr. N.D. Ohio 2022) – Automatic stay does not apply in domestic relations action unless domestic relations action would determine division of property that is property of estate. Objective is to preserve primacy of Bankruptcy court jurisdiction over estate property. Stay would be modified to allow Wife to proceed with divorce proceedings where one asset to be distributed is stock of Debtor owned 100% by Husband. State Court can determine marital property, value property, and reduce findings to judgment, including division and award of marital property. No action may be taken on any

judgment entered and state court cannot restrict Debtor's ability to continue operations, normal business activity, or proceeding with bankruptcy case

XXXVII. Automatic Stay – Contempt

Walsh v. Paragon Contractors Corp., 2022 WL 1224975 (D. Ut. 202), *appeal filed*___WL ___ (10th Cir. 2022) – Bankruptcy filing does not stay Court from enforcing prior orders through contempt proceedings. Courts have inherent authority to manage affairs including power to punish for contempt which may include civil fine. Court issued Injunction against Debtor and Debtor's principal. Some years later, Debtor was found to be in violation of injunction and Court imposed $1 million contempt sanction. After Debtor did not pay, Lower Court imposed receiver, following which Debtor filed for Chapter 7. Fact that contempt judgment imposed financial obligation did not immunize Debtor from Receiver's efforts to carry out Receivership Order. Violation of permanent injunction has traditionally sounded in contempt and Congress did not intent to prevent use of contempt power to uphold dignity of court. Contempt to uphold dignity of Court is not stayed, while contempt citation used simply to collect judgment owed creditor is subject to limitations of Bankruptcy Code

XXXVIII. Automatic Stay – Void Versus Voidable

In re Wright, 2022 WL 2498770 (Bankr. E.D. Mi. 2022) – Actions taken in violation of stay are voidable and not void where debtor unreasonably withholds notice of stay and creditor would be prejudiced if debtor raises stay as defense or debtor is attempting to use stay unfairly to shield unfavorable result. Creditor's post-petition sale of property would is not void where Debtor and counsel knew before case was file that foreclosure sale was set; debtor filed one day before scheduled sale; neither Debtor nor counsel contacted Creditor to give notice of filing until day after sale had occurred; and creditor did not know of bankruptcy case until being advised one day after sale occurred. Court would treat sale as if sale did not violate stay. Using stay to set aside sale where Debtor unreasonably withheld notice would unfairly prejudice Creditor by avoiding sale after Creditor incurred costs and legal fees associated with sale and changed position by enforcing right to foreclose; and voiding sale would also prejudice third-party purchaser.

XXXIX. Automatic Stay – Section 362(c)

In re Madsen, 639 B.R. 761 (Bankr. E.D. Cal. 2022). Termination of stay pursuant to Section 362(c)(3)(A) "with respect to the debtor" did not terminate stay for all property of the estate or in its entirety in bankruptcy case. Following Collier and *Rose v. Select Portfolio Servicing, Inc*., 945 F.3d 226 (5th Cir. 2019); *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008); *In re McGrath*, 621 B.R. 260 (Bankr. D.N.M. 2020); *In re Thu Thi Dao*, 616 B.R. 103 (Bankr. E.D. Cal. 2020); *In re Roach*, 555 B.R. 840 (Bankr. M.D. Ala. 2016).

In re Thomas, 639 B.R. 285 (Bankr. S.D.N.Y. 2022). Under Section 362(c)(4), debtor was not entitled to the protection of the automatic stay where debtor had two other Chapter 13 cases pending and dismissed within the previous year.

XL. Proof of Claim – Secured Claims

In re Flores, 649 BR 534 (Bankr. N.D. In. 2023) – Secured creditor not required to file claim in Chapter 13 to preserve lien. Creditor who does not file will not receive disbursements from Trustee but lien survives discharge. Creditor prevented from taking action inconsistent with confirmed Chapter 13 Plan during pendency of case. Plan proposed to pay claim secured by Debtor's automobile. Creditor did not file proof of claim notwithstanding reminders by Trustee. Trustee later filed Motion to allow Trustee to release funds held for secured creditor to other creditors. Creditor then sought stay relief to repossess car as Creditor was not being paid and collateral was diminishing in value. Court concluded that creditor not entitled to adequate protection because adequate protection is intended only s "stop gap" measure for time between filing and confirmation. Confirmed Plan was res judicata and after confirmation, creditors limited to interests provide for in Plan. Creditor not entitled to stay relief during case but would retain lien with full right to enforce after expiration of plan or dismissal of case.

XLI. Chapter 13 – Binding Effect of Plan

In re Mastro-Edelstein, 645 B.R. 603 (Bankr. N.D. Ill. 2022). Creditor's failure to challenge confirmation of Chapter 13 Plan bound it to Plan's terms, notwithstanding its properly filed Proof of Claim. Plan said mortgage arrears were about $17,000, mortgagor's POC said $35,000. Confirmed Chapter 13 Plan controlled.

In re Collins, 2021 WL 2932488 (Bankr. E.D. Ky. 2021) – Confirmed plan binds debtor and creditor whether or not creditor is provided for by plan and whether creditor objected to, accepted, or rejected plan. Time to raise issue that directly contradicts treatment of claim is at confirmation hearing. If issue could have been decided at confirmation hearing, confirmation of plan is res judicata. Confirmed plan is final judgment that is binding if it becomes final without appeal or request to vacate. Action by creditor seeking relief that is incompatible with plan properly overruled. Mortgage company precluded from attempting post-confirmation to reform mortgage. Prior to commencement case, Debtor owned two parcels of property on the same street, one an occupied dwelling and the other a vacant lot. Mortgage company made error and recorded mortgage on lot rather than residence. Debtor filed Chapter 13 and proposed in Plan to surrender vacant lot and treat deficiency as unsecured claim. Creditor admittedly had notice and did not object to confirmation. Status of mortgage as lien on vacant lot which was surrendered established as part of confirmation process. Post-confirmation, Creditor sought stay relief to file an action to reform the mortgage to correct the legal description for the residence, asserting that State law would allow reformation to correct the error. Attempt post-confirmation to change description of property was inconsistent with terms of confirmed plan and barred by Section 1327.

Owens v. Coffey, 2018 WL 1162535 (Bankr. W.D. Ky. 2018) – Res judicata, also known as claim preclusion, bars party from relitigating previously adjudicated cause of action. Collateral estoppel, also known as issue preclusion, bars parties from relitigating any issue actually litigated and finally decided in prior action. Confirmation of Chapter 13 Plan is not res judicata or collateral estoppel as to dischargeability of claim. Plan's treatment of claim as general unsecured dischargeable claim did not specifically identify dischargeability of claim as issue to be determined as part of confirmation of Plan and creditor was not put on notice that Plan would

terminate right to pursue nondischargeability action. Creditor timely filed objection to dischargeability of debt through proper mechanism and properly presented issue for determination. Had Plan included provision calling for nondischargeable debt to be discharged, Plan should have raised objection and Plan could not have been confirmed.

In re Seaver, 640 B.R. 555 (Bankr. D.S.C. 2022). Title Max was in civil contempt for non-compliance with confirmed plan by failing to surrender title to vehicle to debtor free and clear of liens upon entry of discharge, as provided in the confirmed Chapter 13 Plan.

XLII. Chapter 13 – Direct Pay Mortgages

In re Simmons, 608 BR 602 (Bankr. S.D. Ga. 2019) – Adopting minority position, Court concluded that failure to make post-petition direct mortgage payments as required by confirmed Plan. Post-petition mortgage payments paid directly by Debtor are not "payments under the Plan" and failure to make payments standing alone does not merit dismissal of case or denial of discharge. "Payments under the Plan" mean payments that Debtor is to make to Trustee. Debtor's failure to make post-petition direct mortgage payments where payments were accounted for in budget may constitute a lack of good faith.

In re Mrdutt, 600 BR 72 (9th Cir. BAP 2019) – "Overwhelming majority" of Courts conclude that Direct pay secured claims are payments under plan for purposes of Section 1328. Debtor who has not made all direct payments has not completed payments under plan and is not eligible for discharge, even if Debtor has made all required payments to Trustee.

In re Rivera, 599 BR 335 (Bankr. D. Az. 2019) – Failure to pay all direct post-petition mortgage payments is not failure to complete all payments under Plan and does not preclude entry of discharge. Court recognized split of authority and adopted minority position holding that direct payments to secured lenders are not payments under Plan.

Dukes v. Suncoast Credit Union, 909 F.3d 1306 (11th Cir. 2018) – "Direct pay" secured claim is not claim treated in plan where plan did not make provisions for payment nor set forth any repayment terms. Plan merely stated that mortgage would be paid directly by Debtor and lender would not receive payments from Chapter 13 Trustee. Obligation that is not provided for in plan is not discharged even if unpaid at end of Plan term.

XLIII. Attorney Fees – Court Approval of Retention

In re Young, 646 B.R. 779 (Bankr. W.D. Pa. 2022). Chapter 13 debtor's counsel filed application for retroactive approval of employment and requested compensation for its efforts in pursuing personal injury action on behalf of debtor, and trustee objected. The Bankruptcy Court, Gregory L. Taddonio, Chief Judge, held that there were no extraordinary circumstances warranting retroactive approval, precluding recovery of compensation.

In re Hunanyan, 631 BR 904 (Bankr. C.D. Ca. 2021) – Supreme Court decision in *Feliciano* does not preclude compensation to counsel for services rendered prior to entry of order approving retention. Section 327 outlines procedure for having counsel retained while Section 330 provides for compensation for services after professional has been properly employed. Neither Section 327 nor Section 330 has temporal requirement for when application must be filed but Rule 6003

precludes appointment within first 21 days of case absent showing of immediate and irreparable harm and Rule 9013 requires written Motion which requires at least 7-days' notice. Where Trustee requires legal work to be performed before Order of retention is entered. Where professional assistance is needed before hearing can be held, trustees must determine if action is needed quickly to properly carry out required duties and court review is necessarily done later for both the employment criteria and the fees incurred. Nothing in Sections 704 or 327 requires trustee to wait for court's approval before exercising duties. Any subsequent disapproval of employment must be based on criteria enumerated in Section 327 and Rule 2014. Requiring satisfactory explanation for failure to receive pre-employment approval makes no sense when rules themselves provide for delay. Trustee does not have "license to wait" to seek court approval for retention and long delays will require evidence of extraordinary or exceptional circumstances. Application for employment approved effective date on which work commenced where there was no evidence of any delay in seeking approval for retention.

In re Roberts, 618 BR 213 (Bankr. S.D. Ohio 2020) - Section 327 and Rule 2014 govern process for obtaining employment of professional and require showing that person to be retained does not hold or represent interest adverse to estate and is disinterested. Debtor has responsibility to see Court authority to hire professionals to represent Debtor and estate interests and attorneys must communicate significance of seeking Court approval before engaging professional to represent interest of bankruptcy estate. Application to retain counsel filed nine months after performance of services on *nunc*

XLIV. Attorney Fees – Unbundling

In re Rosema, 641 B.R. 896 (Bankr. W.D. Mo. 2022). Examining settlement of bifurcated fee issues between U.S. Trustee and debtors' attorneys.

In re Prophet, 2022 WL 766390 (D.S.C. March 14, 2022). Bifurcated fee agreements not prohibited as a matter of law, but adequate disclosure, etc. required.

In re Digregorio, 645 B.R. 262 (Bankr. M.D. Fla. 2022). Bifurcated fee scheme which purported to allow counsel for Chapter 7 debtor to advance filing fee on her behalf could not comply with Rule 1006.

In re Baldwin, 640 B R 104 (Bankr. W.D. Ky. 2021) – Bifurcation was inherent attempt to avoid Code and Rules by allowing Counsel to "walk away" after filing. Where Counsel filed petition, counsel is obligated to perform all services in ensuing Chapter 7 regardless of what fee agreement may state. Client's failure to sign post-petition fee agreement would not relieve Counsel of duty to prepare and file remaining papers and represent Debtor in Chapter 7 other than in adversary proceedings.

In re Carr, 613 BR 427 (Bankr. E.D. Ky. 2020) – Bifurcated fee agreement approved where attorney and client both signed fee agreement; attorney did not advise Debtor to incur debt on eve of filing for purposes of paying attorney fees; attorney did not take payment for post-petition services until Debtor paid full filing fee; overall fee was reasonable; and client consented after receiving comprehensive written explanation of how fees would be structured and what services were included.

In re Lantz, 643 B.R. 614 (Bankr. D. Idaho 2022). Court orders bankruptcy counsel who filed misleading compensation disclosure to disgorge $1,510 of the $1,910 in fees charged in the case. Court held that factoring attorney fees created a conflict of interest that violated the Idaho Rules of Professional Responsibility.

In re Cialella, 643 B.R. 789 (Bankr. W.D. Pa. 2022). Counsel's failure to disclose use of bifurcated fee arrangement in debtors' Chapter 7 cases warranted partial disgorgement of fees.

In re Suazo, 642 B.R. 838 (Bankr. D. Colo. 2022). Debtor's attorney and law firm violated the sections of the Bankruptcy Code governing "debt relief agencies" because their pre-filing agreement was misleading and contained misrepresentations.

In re Shepherd, 644 B.R. 130 (Bankr. W.D. Pa. 2022). Complete fee disgorgement was not appropriate remedy for attorney's violation of district's newly announced Chapter 7 bifurcation fee standards. Court ordered disgorgement of lesser amounts in over 20 cases – from $150 to $1,000.

In re Montilla, 2022 WL 12165276 (Bankr. N.D. Ill. 2022). *Harris v. Viegelahn* prevents payment of Chapter 13 debtor's attorney fees by the Chapter 13 trustee after the case has been converted to Chapter 7.

XLV. Attorney Fees - Disgorgement

In re 36-38 Greenville Ave., LLC, 2022 1153123 (3d Cir. 2022) – Bankruptcy Court has constitutional authority to deny compensation and order disgorgement. Fee awards are "core" proceedings well within Court jurisdiction. Counsel received payment of fees from Debtor's principal post-petition, without application and without disclosure. When counsel finally disclosed payment more than one year after receipt, Counsel repeatedly violated Code and Rules and engaged in "lack of candor" in attempting to explain payment by principal. Counsel initially argued that payment was something other than unauthorized loan incurred by debtor, then admitted payment was loan but attempted to reverse course when reminded that any debt incurred by debtor needed Court approval. Counsel intentionally omitted payments from Debtor's Monthly Operating Reports which would have caused Reports to "go negative" likely resulting in dismissal of case and were attempt to mislead Court, UST and creditors as to true status of Debtor's financials. Code and Rules impose rigorous structure of oversight on debtor, professionals, and estate requiring presumption and expectation disclosure and candor. Court ordered disgorgement of all fees received by counsel where Counsel acted in willful disregard of Code and Rules as well as Code of Professional Conduct as payments by principal created at least potential conflict of interest

XLVI. Claims Objections

In re Promise Healthcare Group, LLC, 2023 WL 3026715 (Bankr. D. Del. 2023) – Timely filed proof of claim does not become unenforced where Statute of Limitations on claim otherwise expires during course of Bankruptcy proceeding. Validity of claim determined by facts existing on date claim filed and is not rendered unenforceable by later passage of time

In re Eriksen, 647 BR 192 (Bankr. N.D. Ohi 2023) – Validity of claim is determined as of petition date. Post-petition events are not relevant beyond those specified in Section 502(a)-(i). Debtor's objection overruled where based on premise that possibly at some point in future either President or Congress will forgive student loans. Potential student loan relief does not overcome prima facie validity of student loan claim on petition date.

In re Diehl, 2018 WL 2670489 (Bankr. N.D. Ohio 2018) - Code allows objection to proof of claim only to determine validity of debt; debt falls within finite list of reasons for which claim may be denied; or to determine amount due as of petition date. Objection to claim that raises some other basis is not objection to claim under Section 502 and must be disallowed. Debtor's objection to secured creditor's claim based on treatment in confirmed Chapter 13 Plan that allows for disbursement of payments to creditor directly by Debtor did not assert basis on which claim should be denied. Objection falls outside limited scope of Section 502 and misunderstands effect of disbursement by Debtor as claim remains one that is being treated by, and paid according to terms of, Chapter 13 Plan.

XLVII. Mortgage Issues

In re Simmons, 643 B.R. 565 (Bankr. D.S.C. 2022). Chapter 13 debtor awarded his reasonable attorney fees as sanction for mortgagee's failure to accurately state loan arrearage on its proof of claim.

In re White, 641 B.R. 717 (Bankr. S.D. Ga. 2022) - 3002.1 did not apply to bifurcated claim to manufactured home.

In re DeWitt, 2022 WL 4588320 (Bankr. S.D. Ohio 2022) – Lender required to file response under Rule 3002.1 to Trustee's Notice of Plan Completion if lender believes there Are balances remaining unpaid.

XLVIII. Means Test – Household Size

In re Poole, 2022 WL 5224087 (Bankr. N.D. Tx. 2022) - Court adopted "economic unit" test for determining number of members of household for means test purposes.

In re Woldstad, 2018 Bankr. Lexis 2392 (W.D. Wash. 2018) – Court adopted "economic unit" test for determining member of household for means test purposes. After discussing three alternative methods – Census bureau "heads on beds"; IRS definition of "dependent" and "Economic Unit test that requires financial relationship between people living in Debtor's residence – Court settled on Economic Unit test as most realistic. Where Debtor had child who lived with him part time and Debtor paid child support and medical insurance, child was part of Debtor's "economic unit" and so was member of household notwithstanding only part-time residence. Child was economically dependent on Debtor and spent more than *de minimus* time with Debtor. Court specifically rejected "fractional child" which divides child into fractional units depending on how many days child actually resides with Debtor and concluded that counting part time resident as "full time" household member was better approach.

In re Skiles, 504 BR 871 (Bankr. N.D. Ohio 2014) – In determining household size, court would not limit analysis to IRS definition of dependent, nor would court use "heads on beds" theory. Court

would include only those individuals who acted as single economic unit with Debtor, defined as those who Debtor financially supports and those who financially support Debtor. Individuals listed in Debtor's tax return are rebuttably presumed to be members of Debtor's household. Individuals not listed in most recent tax returns as dependents are rebuttably presumed not to be members of Debtor's household. The party desiring a different conclusion has the initial burden of providing evidence showing the individual satisfies the "economic unit" definition. In determining whether person is part of "economic unit", court will consider degree of financial support provided to the individual by Debtor; degree of financial support provided to Debtor by the individual; extent to which individual and Debtor share income and expenses; extent to which there is joint ownership or properly; extent to which there are joint liabilities; extent to which assets owned by Debtor or the individual are shared, regardless of title; and any other type of financial intermingling or interdependency between Debtor and individual. "Economic unit" will be construed expansively to include unmarried couple that shares living expenses in shared home and shared a significant amount of income and expenses; Debtor, girlfriend, their child and her children from prior relationship, where Debtor was primary source of support for girlfriend and her children; and adult daughter and her children where daughter and children were dependent on Debtor for support. If Information that may bear on includes a domestic relations order, such as a separation agreement or child custody order, but court may not accept domestic agreement that attempts to "even things out" and may not represent the economic realities of the parties. Official documents completed before Debtor's contemplation of bankruptcy such as an application for a residential loan or governmental assistance, which includes Debtor's household size may be relevant. Other information, such as receipts, bank statements, or credit card statements which either show or do not show costs consistent with caring for another may also be beneficial. Debtor's bald statement that an individual either is or is not part of Debtor's "household," without more, is insufficient when a good faith challenge is asserted. An adult capable of supporting himself, but who is not working without reasonable cause and lives off the generosity of Debtor, usually should be excluded from Debtor's "household," even if the adult would otherwise satisfy the requirements of the "economic unit" definition. A contrary rule would result in a Debtor's creditors subsidizing the adult's decision not to work. Debtor failed to establish larger household size where tax return listed only one child, where Debtor had shared custody of three children from prior marriage and had part-time custody. Fact that children spend a few days per month with Debtor did not establish that Debtor provided economic support or that children were part of "economic unit" of Debtor rather than of ex-wife who had primary custody. Even if children were considered part of household they would be considered only as "part time" members with proper accounting for time spent with each parent and counted on fractional basis.

XLIX. Leases and Land Contracts

In re Williams, 646 B.R. 399 (Bankr. S.D.N.Y. 2022). Warning was warranted for Chapter 7 debtor's counsel's failure to notify the court, at the time of the Petition, of the fact that the landlord had obtained a pre-Petition judgment of possession.

In re Peralta, 48 F.4th 178 (3rd Cir. 2022). Chapter 13 debtor's ability to "cure" land contract default ended with judgment for possession. It was the closest analogy to the "hammer falling" in a foreclosure sale.

Buhler v. Davis, 2022 WL 17184617 (Bankr. M.D. Tn. 2022) – Under land contract, title to property remains in seller and is enforceable by forfeiture if buyer defaults. Forfeiture treats contract as terminated by buyer and allows seller to retain all payments and retake possession without necessity of legal action. Land contracts (also known as installment land sale agreements) are executory contracts under Section 365as long as both parties have unperformed obligations, buyer to pay and seller to convey title. When debtor breaches agreement pre-petition, seller had no further duty, contract is no longer executory. Land contact called for monthly payments and for final balloon payment. Debtor (buyer) did not make last contractual payment, Debtor advised Seller that Debtor would not be able to make balloon payment, and Debtor did not make final payment, all of which constituted events of default. Contract terminated automatically without notice of default or any other action on party of seller. Debtor had no interest in property on petition date warranting relief from stay to permit State Court wrongful detainer proceedings to complete.

Connor v. Property Fund 629, LLC, 636 BR 507 (Bankr. M.D. Tn. 2021) - 11 USC Section 362(b)(22) provide safe harbor for landlord who seeks to evict Debtor who resides as tenant under lease or rental agreement where lessor obtained before commencement of bankruptcy case a judgment of possession for property. Section 362(b)(22) did not apply where Debtor did not hold possession under lease or rental agreement but was, instead, owner of property who lost property in foreclosure and as to which Court had subsequently issued eviction order. Eviction was bi-product of foreclosure process. Had Congress intended to include party refusing to relinquish possession after foreclosure Congress would not have limited exception to tenants under lease or rental agreements or would have added additional exception under Section 362(b) to address property owners who refused to relinquish possession after foreclosure. Deed of Trust which grants lien on property does not create lease or rental agreement between holder of Deed of Trust and grantor of Deed of Trust. Section 362(b)(22) creates distinction between "tenancy at sufferance" in which party retains possession after right to possession has expired or terminated; and tenancy under a "lease or rental agreement" which provides for right of possession for defined time period.

L. Section 707 – Denial of Discharge

Vara v. McDonald, 29 F.4th 817 (6th Cir. 2022) – Section 727(a)(5) allows Court to deny discharge where Debtor does not satisfactorily explain loss of assets to meet obligations. Intent is not element of action. Section 727(a)(5) has on "lookback" period or imitation. While Courts normally focus on 2 years pre-petition, this is not fixed or limiting period and longer lookback is warranted where unexplained losses made up crucial portions of Debtor's financial history and were not too far-removed from bankruptcy process. Once Trustee establishes loss of assets, Debtor must do more than present vague, indefinite or uncorroborated hodgepodge of information. Debtor's "threadbare" recitation from memory is not sufficient particularly where testimony was often unclear or uncertain and Debtor offered little evidence to back up testimony including no

documentation regarding more than $75,000 in personal checks drawn from account, substantial deposits into personal account, or near-total loss of $100,00 which Debtor blamed on gambling and day-trading. Debtor was sophisticated actor with significant financial experience making explanation even less convincing.

In re Coffey, 647 B.R. 365 (Bankr. E.D. Ark. 2022). Debtor's willful and intentional failure to comply with Bankruptcy Court's Orders regarding production of documents warranted denial of discharge.

Johnson v. Johnson, 644 B.R. 246 (N.D. Ga. 2022). Bankruptcy court had subject matter jurisdiction to grant debtor's Chapter 7 discharge, regardless of debtor's alleged residence in another state. Ex-spouse had asserted that debtor misrepresented his domicile, and that venue was improper. District court held that venue was not jurisdictional, and ex-spouse had not appealed prior venue determination.

LI. Tax Sales

In re Riendeau, 645 B.R. 321 (Bankr. D. Me. 2022). Real property tax lien foreclosure did not, as a matter of law, establish reasonably equivalent value, but successful bidder was an "immediate transferee" who took for value and without knowledge of voidability.

Hampton v. Ontario County, 588 BR 671 (W.D.N.Y. 2018) – Real property tax foreclosure sale can constitute fraudulent transfer. Supreme Court holding in *BFP* limited to mortgage foreclosures and has no bearing on other forced sale such as tax liens. After County had obtained judgment of possession and before County resold property, Debtor filed Chapter 13 petition and submitted Plan to pay real estate taxes in full. Tax collector proceeded with auction which generated surplus of $21,000 which would benefit County, not Debtor or Debtor's creditors. Tax sales are different and command lower prices compared to mortgage foreclosures and tax sale would allow County to receive windfall at expense of creditors.

LII. College Tuition

DeGiacomo v. Sacred Heart University, 942 F.3d 55 (1st Cir. 2019) – Payment for adult child's college tuition when parents are insolvent is not reasonable equivalent value as matter of law. Fraudulent transfer law is to preserve the estate or benefit creditors requiring evaluation of transfers from creditor's perspective. Tuition payments depleted estate and furnished nothing of direct value to creditors for central concern of fraudulent transfer provisions. Section 548 lists five types of transactions that can value: exchange of property; satisfaction of present debt; satisfaction of antecedent debt; securing or collateralized present debt; and granting of security for purpose of securing antecedent debt. Payment of tuition is not within five described categories and parents do not have legal obligation to pay college tuition for adult children. While payments may be for worthy cause, that does not except payment from operation of Section 548.

Geltzer v. Oberlin College, 594 BR 229 (Bankr. S.D.N.Y. 2018) – Parent who pays college expenses for minor child receives reasonably equivalent value by discharging duty to provide child's education. Court will not look behind particular college chosen or weigh whether adequate education could have been provided at lower cost. However, college expenses paid after child

attains age of majority lack reasonably equivalent value as parent has no legal duty to provide education. Value requires transfer of property or satisfaction of antecedent debt, neither of which result from payment of adult child's college expenses. Likelihood that children will be self-sufficient and productive members of society, or "psychic and other intangible benefits" from knowing that children are able to care for themselves while laudable, is not "value".

In re Teston, 646 B.R. 417 (Bankr. D. Md. 2022). Chapter 7 trustee sued to recover tuition payments as a fraudulent transfer. For refundable payments, University was a "mere conduit". But, University was "initial transferee" of tuition and other payments made by Chapter 7 debtor on behalf of his son after refund period expired.

LIII. CARES Act Extensions

In re Nelson, 646 BR 810 (Bankr. E.D. Wis. 2022) - Plan was confirmed before effective date of CARES Act later modified to extend the term to 84 months. After CARES Act "sunset" Debtor sought to modify Plan to adjust the amount Plan payment. Section 1329(c) allows the Court to modify the Plan but court may not approve plan that expires after five years after first payment due date. With the sunset of the CARES Act, there is no statutory basis to approve a modification that extends beyond 60-months. Fact that current modification did not change Plan term did not allow for modification because Section 1329(b) requires Plan as modified to comply with Section 1329(c), not merely that the modification comply. Because modified plan would run more than 60 months in violation of Section 1325(b)(4).

In re Sykes, 638 BR 578 (Bankr. E.D. Mi. 2022 – CARES Act Section 1329(d) which allowed plan to extend up to 84 months expired on March 27, 2022. Court no longer had authority to approve modification that would extend plan beyond 60 months from effective date.

In re Bohinski, 638 BR 870 (Bankr E.D. Mi. 2022) – Modification could not extend plan term from 64 months to 67 months. Prior extension to 64 months permitted by CARES Act Section 1328(d) but further extension no longer available e where Section 1329(d) repealed effective March 27, 2022. Although Modification filed before March 27, Court's ability to extend plan term expired when Modification had not been approved by Court on or before March 27.

LIV. Reopening Closed Case – Criminal Proceeding

In re Reichel, 645 B.R. 620 (8th Cir. BAP 2022). Obtaining relief from his criminal conviction for bankruptcy fraud was an improper purpose that could not constitute cause to reopen Debtor's Chapter 7 case.

LV. Chapter 13 Dismissal – Section 1307

In re Lee, 2022WL 4085882 (Bankr. E.D. Mi. 2022) – Debtor's failure to provide tax returns to Trustee constituted material default warranting dismissal.

LVI. Concurrent Standing

Connor v. Property Fund 629, LLC, 636 BR 507 (Bankr. M.D. Tn. 2022) - Debtor in Chapter 13 has co-existent standing with Chapter 13 Trustee to bring adversary proceedings. Debtors in Chapter 13 have different status than Chapter 7 under Section 1326 which provides for possession of

property to remain in Debtor. In addition, Confirmation Order specifically reserved right of Trustee and Debtor to pursue causes of action for benefit of Debtor or Estate. Chapter 13 Trustee could abandon interest in litigation and leave the right to pursue it vested in the Debtor, so there is no rationale to conclude that trustee cannot agree to concurrent standing. Confirmation Order also specifically referred to Debtor's continued pursuit of adversary proceedings and included alternative plan provisions based on outcome of "ongoing litigation" including reserving right of Trustee to seek dismissal or conversion if litigation is unreasonably delayed. Generic provision in one part of Confirmation Order gave Debtor standing to pursue this general type of litigation, and specific provision how outcome can affect plan. Order conveying derivative does not need to be entered prior to the complaint being filed as ability to confer derivative standing is straightforward application of equitable powers to craft flexible remedies in situations where Code's causes of action fail to achieve intended purpose.

LVII. Death or Incompetence of Debtor

In re Brown, 645 B.R. 524 (Bankr. D.S.C. 2022). Bankruptcy court would appoint Chapter 13 debtor's son as guardian ad litem due to debtor's mental incompetence.

In re Richardson, 643 B.R. 848 (Bankr. D.S.C. 2022). Movant failed to demonstrate Chapter 13 debtor's incompetency, as required for appointment of guardian ad litem.

In re Blascak, Case No. 12-61973 (Bankr. E.D. Mi. 2012) – Debtor's Motion to Appoint Debtor's daughter as "next friend to act on all matters to which Debtor can act" pursuant to Federal Rule of Bankruptcy Procedure 1016 denied where motion does not allege or demonstrate that Debtor is incompetent within the meaning of Rule 1016 and does not otherwise state adequate grounds on which relief can be granted.

In re McGee, 2020 WL 5778462 (Bankr. W.D. Mi. 2020) - Upon death of Debtor, attorney's actual and apparent authority to represent Debtor terminates. Only person authorized to represent interests of estate is personal representative appointed by Probate Court in formal proceeding or by registering in informal proceedings and issued letters of authority. Attorney's Motion to Substitute as Counsel for Debtor denied where Attorney has been requested by Debtor's daughter to appear but Daughter was not duly authorized representative of Debtor's estate.

In re Sizemore, 645 B.R. 190 (Bankr. D.S.C. 2022). Further administration of Chapter 13 case was warranted following the post-Petition deaths of both debtors

LVIII. Dismissal – 180 Day Bar to Refiling

In re Galloway, 638 BR 871 (Bankr. E.D. Mi. 2022) – Voluntary dismissal following request for relief from automatic stay bars refiling for 180 days. Dismissal is not discretionary and there does not need to be any nexus between prior stay relief and voluntary dismissal.

In re Higgins, 2023 WL 2357740 (Bankr. E.D. Pa. 2023) – Section 109(g)92) does not mandate dismissal of case filed within 180 days after prior voluntary dismissal absent "causal connection" between prior stay lift requests, dismissal and current filing. Case not dismissed where Debtor established that prior case was dismissed and refiled to take advantage of greater debt limits

available in chapter 13. Debtor did not file because of motions for relief where motions had been resolved before prior case dismissed.

In re Bussell, 626 BR 891 (Bankr. E.D. Mi. 2021) – Section 109(g) is mandatory that when Debtor voluntarily dismisses a case following request for relief from stay, Debtor is not eligible for relief for 180 days. Section 109(g) does not require some causal link or nexus between stay relief motion and later voluntary dismissal or showing of bad faith. Creditor filed for relief from stay in mid-2019 which Court granted. Case voluntarily dismissed March, 2021, and refiled shortly thereafter. Case dismissed as Debtor not eligible for relief until August 3, 2021.

In re Donaldson, 646 B.R. 807 (Bankr. E.D. Mich. 2022). Debtor could not file a Petition when less than 180 days earlier debtor had voluntarily dismissed her Chapter 13 case after creditor had moved for relief from stay.

LIX. Disqualification of Counsel

In re Baum, 639 BR 721 (Bankr. E.D. Mi. 2022) – Attorney cannot be both attorney for Debtor and creditor of estate. Attorney represented Debtor in significant matters pre-petition and continued to do so post-petition. Pre-petition retention was done under contingency fee agreement with Attorney to receive percentage of funds recovered from third party transferees of Debtor's ex-husband. Second pre-petition fee agreement called for hourly rate in separate but related proceedings. As of petition date, counsel held contingent, unliquidated claim against Debtor for contingency fee; and Counsel had expended significant time giving Counsel unliquidated claim under Hourly Rate Agreement. Further, Counsel asserted an attorney's lien against any funds recovered by Debtor constituting secured claim. Immediately after filing Counsel and Debtor entered into new fee agreement that purported to replace and supersede prior agreements and replaced 33% contingence fee plus hourly rate with flat 50% contingency. Counsel then filed Proof of Claim for more than $800,000.00. Counsel initially charged $4,000 for Chapter 13 but later waived that fee and agreed that any fees under any of the three retainer agreements would be subordinated to claims of other creditors with Counsel receiving no fees unless and until all other allowed claims paid in full. Third fee agreement made post-petition is not valid unless parties in interest are given notice and opportunity to object, Court has held hearing, and Court approved retention as entry into third agreement is use by debtor other than in ordinary course by purporting to divert 50% of recoveries (which are property of estate) to Counsel. Michigan Rue of Professional Conduct 1.7 prohibits Counsel from representing client where representation conflict with Counsel's own interests unless Counsel reasonably believes representation will not be adversely affected and Client consents after consultation. Court or opposing party can raise potential conflict although use by opposing party but be monitored to make sure it does not become technique of harassment. Even if conflict does not present danger of prejudice to other creditors based on subordination by Counsel, conflict nonetheless created significant conflict with Debtor particularly including Post-Petition Fee Agreement which amounted to settlement of counsel's pre-petition claim which significantly increases or decreases fees compared to Debtor's obligations under two pre-petition agreements. Counsel has duty to advise Debtor whether to object to claims, whether to settle claims, and on what terms to settle claim. Counsel could not shirk duties to advise and represent Debtor regarding Counsel's own

pre-petition claim. Debtor needed and attorney has duty to provide, independent, objective advice and representation about Counsel's pre-petition fee claims and Counsel could not reasonably give independent, objective advice and representation to the Debtor. Counsel had conflict of interest that cannot be waived and required disqualification.

Sullivan v. Miller, 673 BR 723 (E.D. Mi. 2022) – Party seeking to disqualify opposing counsel has heavy burden to show that continued representation would violate Rules of Professional Conduct and even where Rules have been violated, disqualification is not automatic result. Rule 1.7 prohibits Attorney from representing client if doing is directly adverse to another client unless lawyer reasonably believes representation will not adversely affect relationship with other client and both clients consent after consultation. Debtor's counsel undertook representation of third party defendants (Debtor's parents) in action to avoid transfer. While Debtor has duty to cooperate with Trustee to extent necessary to enable Trustee to perform duties, including complying with reasonable requests and to provide information and documents to assist trustee to recover avoidable transfers, Debtor' duty does not require Debtor to affirmatively assist trustee or to otherwise cooperate in prosecution of action. Duty to cooperate does not amount to fiduciary duty owed to estate, and Debtor may legitimately oppose relief requested by Trustee such as claims of exemptions, demand for turnover of assets, fraudulent transfer claims, and whether Debtor is entitled to discharge. Chapter 7 Debtor may assert own interest in issue involving conflict with Trustee. Counsel's representation of third party (Debtor's parents) did not violate Rule 1.7 merely because doing so would require Counsel to take position adverse to estate as neither Debtor nor counsel owed fiduciary or other obligation to Estate. Representation of Parents could not be "directly adverse" where there was no duty. Further, for individual Chapter 7 cases, ability to waive conflicts lies with Debtor, not Trustee. Where Debtor is corporation, trustee holds power to waive conflicts on corporation's behalf. Individual debtor acts for himself; there is no management that controls individual's power to waive conflict of interest. Granting Trustee expansive power to control waiver would bestow immense leverage on trustee over individual debtor and frustrate individual debtor's ability to obtain necessary independent professional advice.

LX. Revocation of Discharge

In re Rothmund, 645 B.R. 87 (Bankr. E.D. Pa. 2022). Failed to disclose LLC, discharge revoked.

In re Carr, 645 B.R. 790 (Bankr. E.D. Pa. 2022). Chapter 7 debtor's failure to disclose proceeds of post-Petition sale of real property by LLC in which he owned a 50% interest was not found to be a sufficient basis for discharge revocation.

LXI. Fair Credit Reporting Act

Hammoud v. Equifax Information Services, LLC, 52 F.47 669 (6th Cir 2022) – Standing to bring action under FCRA requires injury in fact that is concrete, particularized, and actual or imminent; (2) likely caused by defendant"; and would likely be redressed by judicial relief. Plaintiff had standing where Credit Reporting Agency provided inaccurate information to third party. Disclosing inaccurate information in credit report to third party constitutes a redressable injury sufficient to confer Article III standing. Injury was cognizably traced to Defendant's inaccurate

reporting where credit report showed incorrect bankruptcy filing and report was not removed until after mortgage lender had made inquiry. Credit Reporting Agency violates FCRA where Agency negligently or willfully fails to follow reasonable procedures to ensure maximum possible accuracy. Agency reported incorrect information to third party; report caused injury; and Agency was proximate cause of loss. Whether Agency procedures are reasonable is fact intensive inquiry, but where Agency relies on information obtained from reputable sources, Agency's procedures are reasonable as matter of law. Plaintiff could not establish procedures were unreasonable as matter of law. Plaintiff's attorney inadvertently used Plaintiff's Social Security Number when filing Petition for different individual. Although Counsel corrected error next day, error had already been reported by Lexis/Nexis to the Reporting Agency and Lexis/Nexis did not pick up or report corrective action taken next day. Credit Reporting Agency's reliance on information gathered by outside entities is reasonable so long as information is not obtained from source known to be unreliable and is not inaccurate on its face or otherwise inconsistent with information already had on file. LexisNexis has long been thought to provide accurate, reliable information and Agency employed several safeguards to ensure information's veracity, such as periodic audits to confirm accuracy of LexisNexis's records. Given magnitude of information in reports, consumer is in better position to detect errors and request fix, and once Plaintiff advised Agency of error, Agency promptly fixed error.

LXII. Affordable Care Act – Shared Responsibility Fee

US v. Alicea, 58 F.4th 155 (4th Cir. 2023) – Shared Responsibility Fee under ACA is tax, not penalty, and is afforded priority treatment under Section 507(a)(8). Analysis of tax versus penalty focus on whether obligation is (1) involuntary pecuniary burden laid upon individuals or property; (2) imposed by or under authority of legislature; (3) for public purposes; (4) under police or taxing power; (5) universally applicable to similarly situated entities; and (6) whether granting priority status to government will disadvantage private creditors with like claims; plus any other relevant factors such as whether taxpayer received particularized benefit as payment made for benefit not shared by others is generally not tax. SRP is tax as payment is an involuntary pecuniary burden upon individuals who fail to maintain minimum health insurance coverage; imposed by Congress; levied for public purpose of expanding health insurance coverage; imposed under Congress's taxing power; it is universally applicable to all taxpayers subject to the Individual Mandate who do not maintain minimum health insurance coverage; and granting priority status to IRS will not disadvantage similarly situated private creditors. Payment calculated and administered like tax: (1) paid into Treasury by taxpayers when they file tax returns; (2) does not apply to individuals who do not pay federal income taxes because household income is too low; (3) is calculated using factors familiar to tax context such as "taxable income, number of dependents, and joint filing status"; (4) is found in Internal Revenue Code and enforced by IRS; (5) is assessed and collected in same manner as taxes; and (6) produces at least some revenue for government. While payment is not traditional tax on income, tax is calculated based on income for purposes of Section 507(a)(8).

In re Szczyporski, 34 F.4th 179 (3d Cir. 2022) – Shared Responsibility Fee under ACA is tax, not penalty, and is afforded priority treatment under Section 507(a)(8). Analysis of tax versus penalty focus on whether obligation is (1) involuntary pecuniary burden laid upon individuals or property;

(2) imposed by or under authority of legislature; (3) for public purposes; (4) under police or taxing power; (5) universally applicable to similarly situated entities; and (6) whether granting priority status to government will disadvantage private creditors with like claims; plus any other relevant factors such as whether taxpayer received particularized benefit as payment made for benefit not shared by others is generally not tax. SRP is tax as payment is an involuntary pecuniary burden upon individuals who fail to maintain minimum health insurance coverage; imposed by Congress; levied for public purpose of expanding health insurance coverage; imposed under Congress's taxing power; it is universally applicable to all taxpayers subject to the Individual Mandate who do not maintain minimum health insurance coverage; and granting priority status to IRS will not disadvantage similarly situated private creditors. Payment calculated and administered like tax: (1) paid into Treasury by taxpayers when they file tax returns; (2) does not apply to individuals who do not pay federal income taxes because household income is too low; (3) is calculated using factors familiar to tax context such as "taxable income, number of dependents, and joint filing status"; (4) is found in Internal Revenue Code and enforced by IRS; (5) is assessed and collected in same manner as taxes; and (6) produces at least some revenue for government. While payment is not traditional tax on income, tax is calculated based on income for purposes of Section 507(a)(8).

IRS v. Juntoff, 636 BR 868 (6th Cir. BAP 2022) – Section 507(a)(8) affords priority treatment for tax on or measured by income or gross receipts and excise taxes on pre-petition transactions. Tax is pecuniary burden laid upon individuals or property for purpose of supporting Government while penalty is exaction imposed as punishment for unlawful act. Court must engage in functional examination of applicable statutory scheme taking into account whether payment is (a) involuntary pecuniary burden; (b) imposed by, or under authority of legislature; (c) for public purpose; (d) under police or taxing power of state; (e) pecuniary obligation is universally applicable to similarly situated entities; and (f) according priority treatment to the government claim not disadvantage private creditors with like claims. "Shared Responsibility Payment" is "tax measured by income". Charge is measured by income as amount is determined in part by Debtor's taxable income. Section 507 does not require that tax be calculated solely or primarily based on income but only that it to some extent be measured by income. Charge is "universally applied" even though Government has discretion to grant hardship exemptions as charge universally applied to all persons who are in position to be subject to payment, not including individuals who are exempt. Charge was not "penalty" where individual mandate clearly aims to induce purchase of health insurance, failure to do so is not unlawful. Neither ACA nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring payment to IRS.

LXIII. HOA Cases

In re Adam, 646 B.R. 846 (Bankr. S.D. Fla. 2022).

In re Clement, 644 B.R. 917 (Bankr. S.D. Fla. 2022)

LXIV. Reopening Closed Case – Financial Management

In re Odoms, 2023 WL 2191021 (Bankr. E.D. Mi. 2023) – Section 1328 requires Debtor to complete post-petition financial management class to obtain discharge. Whether to reopen case to allow Debtor to complete course and obtain discharge determined on 1) whether there is reasonable explanation for failure to comply; (2) whether request was timely; (3) whether fault lies with counsel; and (4) whether creditors are prejudiced. Case closed without discharge when Debtor did not file Certification regarding financial management class. Two years later, Debtor filed Motion to Reopen, alleging that failure was due to "excusable neglect". Explanation did not constitute valid or adequate excuses where Debtor had ample notice of requirement. Delay of 2 years after case closed before seeking to reopen unreasonable where Debtor and counsel were both advised that case had been closed without discharge. Motion did not offer any explanation for Debtor not taking financial management course until 2 years after case closed. Delay undercuts Congressional policy for financial management course by undercutting purpose and resulting in little if any educational benefit. Debtor did not allege that fault lies with counsel and Debtor admitted that she did not return paperwork to counsel. Creditors would be prejudiced where granting motion would spring discharge on creditors who may not receive notice or know of discharge.

In re Flake, 642BR 261 (Bankr. E.D. Mi. 2022) – Section 1328 requires Debtor to complete post-petition financial management class to obtain discharge. Case closed without discharge when Debtor did not file Certificate Regarding Domestic Support Obligation or a Certification regarding financial management class. Three years later, Debtor filed Motion to Reopen, asserting that Debtor did not file required certificates as Debtor was working full time and was primary caregiver for elder father. Explanation did not constitute valid or adequate excuses for failure to complete course and file required certificates due more than 3 years earlier and delay of almost 3 years after case closed before seeking to reopen. Many debtors work full time and take care of family members yet file the required certificates in a timely manner and Clerk reminded Debtor of requirement. Motion did not offer any explanation for Debtor not taking financial management course until 3 years after case closed, on eve of filing Motion to Reopen. Delay undercuts Congressional policy for financial management course by undercutting purpose and resulting in little if any educational benefit. Debtor did not allege that fault lies with counsel and Debtor admitted that she did not return paperwork to counsel. Creditors would be prejudiced where granting motion would spring discharge on creditors who may not receive notice or know of discharge.

In re Clark, 2022 WL 2387520 (Bankr. E.D. Mi. 2022) – Local Bankruptcy Rule 5010-1 allows Court to reopen case ex parte to allow Debtor to file Certificate About Financial Management Course or Certification Regarding Domestic Support Obligation. Federal Rule 1007(c) allows extension only for cause. Motion did not attempt to demonstrate cause. Local Rule cannot supersede Federal Rule to allow Court to grant relief where requirements of Federal Rule are not met. Rule 9029 makes Local Rules subordinate to Federal Rules and Local Rules cannot be inconsistent with Federal Rules.

LXV. Reopening Closed Case – Lien Avoidance

Smith v. Kleynerman, 647 BR 196 (E.D. Wis. 2022) – Court has discretion to reopen case to permit Debtor to avoid judicial lien that impairs exemptions. Denial of Motion to Reopen may be reversed as abuse of discretion.

LXVI. Reopening Closed Case – Omitted Asset

In re Maldonado, 646 B.R. 917 (Bankr. D. Utah 2022). Debtors could not reopen bankruptcy case more than five years after the first Chapter 13 Plan payment, and after completing their Plan. Debtors failed to list a personal injury claim, but case should not be reopened to relieve a party of the consequences of his own mistake or ignorance, nor is good cause to reopen established by mere inattention or neglect.

LXVII. Reopening Closed Case – Reaffirmation Agreement

In re Ostrowski, 635 BR 181 (Bankr. M.D. Fl. 2022) – Court will not reopen case to file Reaffirmation Agreement where reopening would be futile. Reaffirmation Agreement must be made before entry of discharge. Court lacked authority to approve Reaffirmation agreement not timely executed.

In re Keener, 2020 WL 6338023 (Bankr. N.D. Ohio 2020) - Section 524 requires that reaffirmation agreement be entered into before Debtor is granted discharge. Court would not vacate discharge order under Rule 60 for purposes of allowing parties to execute and file post-discharge reaffirmation agreement. Rule 60 cannot be used to abridge, enlarge, or modify a substantive right and Debtor lacks statutory authority under Section 27 to seek revocation of discharge. Rule 60 can only be used to correct Court error in entering discharge order. Court rejected the nor the review that discharge would be set aside where Debtor was not at fault for fact that agreement was executed late and no party would be prejudiced, concluding that Rule 60 cannot be used to override Section 524. Even if Rule 60 could be used, granting of relief under Rule 60(b)(1) for excusable neglect requires consideration of whether Debtor's failure to obtain timely reaffirmation agreement is result of excusable neglect; whether any opposing party would be prejudiced; and whether party holds meritorious underlying claim or defense. Whether neglect is "excusable" takes into account risk of prejudice to nonmoving party; length of delay and potential impact on proceedings; reason for delay and whether it was within reasonable control of moving party; and whether moving party acted in good faith. Motion filed more than two months after discharge order was entered was not result of Debtor's lack of good faith and did not produce any discernible risk of prejudice to creditor or bankruptcy estate. However, Debtor knew that reaffirmation agreement must be executed and filed prior to entry of discharge but did not avail ability under Rule 4004 and Rule 4008 to ask Court. to delay entry of discharge. Circumstances were entirely preventable by Debtor which does not support finding of excusable neglect. Further, Debtor did not have meritorious request where Debtor sought to "temporarily vacate" discharge for 30 days. Section 524 is statutory ,substantive deadline that cannot be waived or extended after discharge was entered; and there was no basis for Court to retroactively vacate discharge where discharge was not product of mistake. Case did not present unusual or extreme situation that warrants relief under catch all provision of Rule 60(b)(6).

In re Hoffman, 582 BR 181 (Bankr. E.D. Mi. 2018) – Court denied Debtor's request to set aside discharge where even if discharge was set aside Debtor could not be afforded additional relief. Debtor sought to set aside discharge to allow Debtor and creditor to enter into reaffirmation agreement. Section 524 allows parties to enter into reaffirmation only before granting of discharge. Parties did not sign reaffirmation agreement before entry of discharge and "reaffirmation cannot occur through conduct but only in writing signed by both Debtor and creditor. Setting aside discharge would not cure problem as discharge has already been entered and setting aside discharge would not change that fact. Even if discharge is set aside, deadline for filing reaffirmation is 60 days after date first set for Section 341 meeting, a deadline which has long past. Although court has discretion to extend deadline, extension can be granted only if request made before deadline expires, and no such request was filed in this case.

In re Maiers, 2017 WL 5033660 (Bankr. C.D. Ill. 2017) – Debtor and Creditor who miss deadline for reaffirming debt cannot circumvent requirements of Section 524(c) by stipulating to except debt from discharge. Section 524(c) demands that reaffirmation agreements be made before discharge is granted and must contain specified disclosures. Stipulation to except debt from discharge did not contain required disclosures and was not signed by Debtor, only Debtor's attorney. Order excepting discharge of a debt can only be entered if there was a timely filed adversary proceeding. Stipulation did not constitute Complaint in Adversary Proceeding depriving court of authority to make a determination of dischargeability. Debtor could not use Section 727(a)(10) to waive discharge as to one specific debt, as Section 727(a)(10) only allows waiver of a general discharge. If Section 727(a)(10) could be used to waive discharge of specific debt, then requirements for reaffirmation agreements under Section 524(c) would be meaningless.

In re Vozza, 569 BR 686 (Bankr. E.D. Mi. 2017) – Court will not reopen case and set aside discharge to allow Debtor to execute reaffirmation agreement where reaffirmation agreement was not executed by parties before entry of discharge. Setting aside discharge would not cure defect as discharge has already been entered, cutting off time for executing reaffirmation agreement. Further, Rule 4008 requires reaffirmation agreement to be filed with Court within 60 days of First Meeting of Creditors. Deadline long ago expired and no party sought, before expiration, to extend time to execute reaffirmation.

LXVIII. Restitution

Kansas v. State Bar of California, 49 F.4th 1158 (9th Cir. 2022). Any debt attorney owed his clients and was obligated to pay either directly to them or to state bar's client security fund was subject to discharge in bankruptcy.

Osicka v. Office of Lawyer Regulation, 25 F.4th 501 (7th Cir. 2022), the Seventh Circuit joined the 1st, 9th and 11th Circuits in holding that costs of an attorney disciplinary proceeding are non-dischargeable under Section 523(a)(7). The Court held that the costs are not reimbursement of an actual pecuniary loss by State Bar disciplinary body, but is a penalty for benefit of a governmental unit.

In re Jellinek, 645 B.R. 293 (Bankr. S.D. Cal. 2022). Debt arising from order for victim restitution did not fall within discharge exception for fines or penalties payable to government entity.

LXIX. Service of Process – Rule 7004

In re South, 645 B.R. 205 (Bankr. E.D. Tex. 2002). After four attempts to serve the Debtor, creditor established sufficient grounds for alternative service – which was permitted to be made by first class mail.

In re Hutto, 647 B.R. 294 (Bankr. D.S.C. 2022). Proper entity that should have been served with summons and complaint - seeking to declare that judgment lien did not exist - was bank, as named defendant, by certified mail to officer of the institution.

In re Greenwell, 2023 WL 1097511 (Bankr. W.D. Ky. 2023) – State-Court Attorney is not agent authorized to receive notice of bankruptcy-related filings where attorney did not sign proof of claim or file appearance in bankruptcy case. Attorney may be deemed agent for service where attorney actively participates in bankruptcy case. Personal service requirement under Rule 7004 not met where motion mailed only to attorney. Order directing sale of property in which third-party held interest void for lack of service on third-party

LXX. Turnover – Section 522

In re Altman, 647 B.R. 148 (Bankr. D.S.C. 2022). Chapter 13 debtor satisfied all elements for turnover of vehicle that creditor had repossessed from her.

LXXI. Valuation – Secured Claims

In re Lay, 645 B.R. 661 (Bankr. D. Kan. 2022) – Value of mobile home is based on comparable sales without deduction for costs of sale.

In re Neace, 2017 WL 75747 (Bankr. E.D. Ky. 2017) - Valuation of manufactured home must be determined in light of purpose of evaluation which is to determine secure portion of lien to be paid over life of the Plan. "Replacement value" is standard used, defined as price a retail merchant would charge for property of that kind concerning age and condition of property at time of valuation. Costs to set up and deliver a new manufactured home are not included in the "replacement value" of manufactured home, particularly where Debtor intends to retain manufactured home and, therefore, would not include either set up or delivery charge. Neither costs of removal nor costs of setup and delivery are considered in determining replacement value and cannot be used to increase the value of property.

Murray Oak Grove Coal, LLC v, Bay Point Capital Partners II, LP, 618 BR 220 (Bankr. S.D. Ohio 2020) – Where Debtor proposes to retain collateral, proper valuation is "replacement cost" defined as amount Debtor would need to pay to replace collateral with comparable property. Retained property is not valued using what Debtor could receive if Debtor sold collateral or reflect that Debtor may stop using collateral in future. Fact that Debtor proposed retention in connection with sale of virtually all assets as "going concern" did not warrant liquidation or foreclosure valuation of collateral where buyer would acquire, retain, and continue to use collateral. Where valuation is determined in connection with confirmation of Plan, date of valuation is date of confirmation hearing.

In re Bassett, 2019 WL 993302 (Bankr. E.D. Ca. 2019) – Evidentiary presumption of claim validity does not extend to value of collateral. Claims allowance process under Section 502 and Rule 3001 is distinct from valuation and bifurcation process under Section 506. Allowance process determines existence and amount of debt while bifurcation process determines how debt is to be paid.